connected disability . . . that is rated as not less than 50 percent disabling."[23] That statute adopts its definition of "veterans' disability compensation" from Title 38,[24] which in turn defines "compensation" as "a monthly payment made by the [VA] to a veteran because of service-connected disability, or to a surviving spouse, child, or parent of a veteran because of the service-connected death of the veteran occurring before January 1, 1957."[25] The Court has not yet addressed this statute.[26]

2. Alaska case law on military retired pay and disability benefits

Under Alaska law, disability pay earned after a divorce[27] — just like any other post-divorce income[28] — is not subject to division in a divorce action. On the other hand, any retirement benefits or pensions earned during the marriage are generally considered marital property.[29] Shortly

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[23] 10 U.S.C. § 1414(a)(2). Some special rules also apply based on length of service for members who retired under Chapter 61 of Title 10. *Id.* § 1414(b).

[24] *Id.* § 1414(e)(2). The definition provided for "retired pay" is described as "includ[ing] retainer pay, emergency officers' retirement pay, and naval pension." *Id.* § 1414(e)(1).

[25] 38 U.S.C. § 101(13).

[26] Only one circuit court decision has mentioned 10 U.S.C. § 1414, and even that was only in a brief footnote. *McCord v. United States*, 943 F.3d 1354, 1357 n.2 (Fed. Cir. 2019).

[27] *Conner v. Conner*, 68 P.3d 1232, 1235 (Alaska 2003); *Miller v. Miller*, 739 P.2d 163, 165 (Alaska 1987) (holding disability pay to be "marital property only to the extent that it compensates for loss of earnings during the marriage"). This distinction becomes less clear, however, when disability pay resembles "true retirement payments" and are based more on "earnings and length of service" as opposed to the disability itself. *Foster v. Foster*, 883 P.2d 397, 400 (Alaska 1994). *** * *** 10 U.S.C. § 1414(a) explicitly limits the concurrent receipt of both retirement and disability pay to individuals with "a service-connected disability . . . that is rated as not less than 50 percent disabling." There are also special rules for those retiring under chapter 61 depending on their length of service, *id.* § 1414(b), but whether that applies to the husband is not clear from the record.

[28] AS 25.24.160(a)(4) ("property . . . acquired only during marriage"); *Schanck v. Schanck*, 717 P.2d 1, 3 (Alaska 1986) (explaining that "post-separation income" is not subject to division).

[29] AS 25.24.160(a)(4) ("retirement benefits, whether joint or separate"); *Young v. Kelly*, 334 P.3d 153, 161 (Alaska 2014) ("[A]n ex-spouse is entitled to a share of the marital portion of an employee-spouse's retirement benefits, to the extent that the employee-spouse earned those benefits during marriage . . . even if they vest after

(continued...)

after *Mansell*, this court was presented in *Clauson v. Clauson* with the question "whether state courts have any power, after *Mansell*, to equitably divide veterans' disability benefits received in place of waived retirement pay. The answer to that question is an unequivocal no."[30] After restating *Mansell*'s core holding, the *Clauson* court acknowledged that "no federal statute . . . specifically prohibits a trial court from taking into account veterans' disability benefits when making an equitable allocation of property."[31] The court recognized that the U.S. Supreme Court's decision in *Rose* was "of more relevance to this question than *Mansell*," which held "that such 'benefits are intended to support not only the veteran, but the veteran's family as well.' "[32] Following *Rose*'s conclusion that state court jurisdiction had not been preempted, the *Clauson* court could identify "no valid reason why veterans disability benefits should not be considered in making an equitable allocation of property."[33] While permitting courts to "consider a party's military disability benefits as they affect the financial circumstances of both parties," the court nonetheless admonished that "[d]isability benefits *should not*, either in form or substance, be treated as marital property subject to division upon the dissolution of marriage."[34]

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[29] (...continued)
divorce."); *see also Gross v. Wilson*, 424 P.3d 390, 395 (Alaska 2018) (permitting division of military retired pay when done in accordance with 10 U.S.C. § 1408).

[30] 831 P.2d 1257, 1262 (Alaska 1992).

[31] *Id.* at 1263.

[32] *Id.* (quoting *Rose v. Rose*, 481 U.S. 619, 634 (1987)).

[33] *Id.* at 1263 n.9. The court ultimately decided that it would follow other jurisdictions post-*Mansell* and only consider "the economic consequences of a decision to waive military retirement pay in order to receive disability pay." *Id.* at 1263-64 (citing *McMahan v. McMahan*, 567 So.2d 976, 980 (Fla. Dist. App. 1990); *Weberg v. Weberg*, 463 N.W.2d 382 (Wis. 1990); *Jones v. Jones*, 780 P.2d 581 (Haw. 1989)).

[34] *Id.* at 1264 (emphasis added). To clarify, neither *Rose* nor *Clauson* held that military disability benefits
(continued...)

This language in *Clauson* was later expanded in *Guerrero v. Guerrero*.[35] There the husband's "military benefits consist[ed] entirely of Chapter 61 retirement and VA disability," and the "Chapter 61 retirement payments were computed using the percentage of [the husband's] disability rating."[36] Applying the exception in 10 U.S.C. § 1408(a)(4)(C)(iii), this court concluded that the husband's retirement pay was "not divisible."[37] Furthermore, the court noted that "state courts have no power to equitably divide VA disability benefits," because "VA disability benefits are not retired pay and do not fall within [10 U.S.C. § 1408(a)(4)]'s definition of disposable retired pay."[38] Although the wife noted that the husband was receiving CRDP, the court reasoned that 10 U.S.C. § 1414 had no effect on whether the husband's concurrent retirement pay was divisible, which was still governed by Section 1408(a)(4).[39] As neither military benefit was divisible, the court warned that "the superior court may not 'simply shift an amount of property equivalent to the . . . retirement pay from the military spouse's side of the ledger to the other spouse's side,' "[40] but it noted that on remand the parties' "financial conditions, including [the husband]'s receipt of his military disability retirement benefits, must be considered when equitably dividing the marital estate

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34 (...continued)
could *never* be treated as marital property.

35 362 P.3d 432 (Alaska 2015).

36 *Id.* at 441-42.

37 *Id.* at 442.

38 *Id.* at 441 (citing *Clauson*, 831 P.2d at 1264).

39 *Id.* at 441-42.

40 *Id.* at 445 (quoting *Clauson*, 831 P.2d at 1264).

and when deciding whether to require alimony."[41]

More recently, this court addressed almost the exact issue presented here as a hypothetical in *Dunmore v. Dunmore*.[42] In that case, the court considered whether Social Security benefits could be taken into account in a property distribution despite federal law prohibiting their division as marital property.[43] Citing *Howell*, the court held that "courts may not evade the federal prohibition by offsetting the Social Security benefits with a larger award of marital property to the other spouse."[44] However, the court reiterated that AS 25.24.160(a)(4)(D) requires consideration of the "the parties' 'financial conditions . . . when equitably dividing the marital estate and when deciding whether to require alimony.' "[45] In holding that courts could consider non-divisible future benefits as part of the parties' financial conditions, the court noted that "three considerations merit particular emphasis": (1) the likelihood of receipt of said future benefits; (2) "whether the anticipated benefits are a substantial financial consideration" in light of other marital assets; and (3) the limited purpose for which said future benefits should be considered, as they "are not marital assets" and therefore only relevant to "achieving an overall just and proper division of the parties' property."[46] Thus the court reasoned that the process of determining "the parties' 'financial condition' when deciding issues such as spousal maintenance and the division of marital property

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41 *Id.* (citing AS 25.24.160(a)(2)(D), (4)(D)).

42 420 P.3d 1187, 1193 (Alaska 2018).

43 *Id.* at 1191 (citing *Hopper v. Hopper*, 171 P.3d 124, 133 (Alaska 2007)).

44 *Id.* (citing *Howell v. Howell*, 137 S. Ct. 1400, 1405-06 (2017)).

45 *Id.* at 1193 (quoting *Guerrero*, 362 P.3d at 445).

46 *Id.* (quoting *In re Marriage of Herald & Steadman*, 322 P.3d 546, 557-58 (Or. 2014)).

allows consideration of even nondivisible assets," including "VA disability benefits."[47]

3. Applying federal and Alaska case law to the husband's CRDP

Alaska case law teaches that courts cannot divide VA disability benefits "either in form or substance," but this is precisely what occurred here. *** * *** By shifting a sum equal to the "coverture portion" of the husband's future VA disability benefits, the superior court accomplished "in form or substance" what it explicitly could not under *Guererro* — it divided VA disability benefits as though they were marital property. The husband is therefore very likely to succeed on this claim.

However, I would be remiss to end my analysis here, because *Guerrero*'s interpretation of *Mansell*, *Clauson*, and the Supremacy Clause is flawed. As noted above, *McCarty*, *Mansell*, and *Howell* all involved the interpretation of a statute governing the treatment of "disposable retired pay" — none of those cases discuss the actual division of disability benefits, and the statute itself is silent on the question.[48] And *Clauson* only stated that courts "should not" treat military disability benefits as marital property.[49] The *Guerrero* court simply assumed (without conducting the underlying preemption analysis) that "state courts have no power to equitably divide VA disability benefits."[50] *Rose* indicates otherwise, and *Clauson* acknowledged that fact.[51] Of course, this court need not explore the Supremacy Clause's precise bounds here — it is enough that

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47 *Id.* (footnote omitted).

48 *See* 10 U.S.C. § 1408(a)(4).

49 *Clauson v. Clauson*, 831 P.2d 1257, 1264 (Alaska 1992).

50 *Guerrero*, 362 P.3d at 441 (citing *Clauson*, 831 P.2d at 1264).

51 *Clauson*, 831 P.2d at 1263 (quoting *Rose v. Rose*, 481 U.S. 619, 634 (1987)).

Guerrero held as much and the superior court failed to comply. *** * *** In other words, any conflict here is with this court's own jurisprudence, not federal law.

Regardless of *Guerrero*, the husband's claim is likely to succeed purely as a matter of state law. Alaska Statute 25.24.160(a)(4) permits the superior court to divide the parties' "property, including retirement benefits, whether joint or separate, acquired only during marriage, in a just manner." *** * ***

The husband's VA disability benefits were part of his future earnings and therefore not subject to division as marital property,[52] much less division in the wholly speculative manner employed here.[53] The fact that the husband qualified for CRDP without having to waive any of his retired pay[54] buttresses the conclusion that the VA disability benefits were separate payments for his service-related disability as opposed to "disability retirement pay."[55] *** * *** The court divided and awarded 30 years of future personal income, pure and simple. *** * ***

Because there is a substantial likelihood that the husband will succeed on the merits, I suggest granting a stay for the amount of VA disability benefits at issue.

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[52] AS 25.24.160(a)(4) ("acquired only during marriage"); *Conner v. Conner*, 68 P.3d 1232, 1235 (Alaska 2003); *Miller v. Miller*, 739 P.2d 163, 165 (Alaska 1987).

[53] The court projected the husband's life span at 80 years and assumed he would receive the same monthly benefits until his death. There is no support for either of these assumptions. *** * ***

[54] *See* 10 U.S.C. § 1414(b)(1) (special rules for Chapter 61 retirees); 38 U.S.C. § 5304 (prohibition against duplication of benefits); *id.* § 5305 (waiver of retired pay). *** * ***

[55] 2 MARITAL PROPERTY LAW *Benefits Subject to Division or Award* § 48:2, Westlaw (database updated June 2019); *accord Foster v. Foster*, 883 P.2d 397, 400 (Alaska 1994) (distinguishing compensation for disability from "true retirement payments" based on "earnings and length of service").

Applicant Details

First Name	**Carter**
Middle Initial	**D**
Last Name	**Stewart**
Citizenship Status	**U. S. Citizen**
Email Address	**carter.d.stewart.44@gmail.com**
Address	**Address** Street **417A Clearbrook Drive** City **Oxford** State/Territory **Mississippi** Zip **38655** Country **United States**
Contact Phone Number	**540-272-1424**

Applicant Education

BA/BS From	**Christopher Newport University**
Date of BA/BS	**May 2018**
JD/LLB From	**The University of Mississippi School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=62501&yr=2011**
Date of JD/LLB	**May 1, 2022**
Class Rank	**15%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

417A Clearbrook Drive
Oxford, MS 38655

04/08/2022
Magistrate Judge Elizabeth W. Hanes
United States District Court
For the Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes,

I am a third year law student at the University of Mississippi, applying for your 2022-2023 Term Clerk position. I currently live in Mississippi, and am applying to take the Bar in Tennessee, but I am from Virginia, originally, and I would love to have the opportunity to return. I would enjoy having the opportunity to gain experience in federal courts, as well as the ability to make connections in the Richmond area.

I believe my experience will allow me to succeed as a clerk next year. I have had the opportunity to work with a Circuit Court Judge in Southwest Virginia for a summer. I gained valuable insight into the legal system and spent many hours observing proceedings. I also got to see the effects of the pandemic on the system and reviewed orders relating to the changing practices over the summer of 2020. I then did work remotely for a lawyer in New Mexico. I was able to see a small firm's practice and aid in several personal injury and consumer debt cases. I helped the attorney think through some of the various issues his clients raised. Last summer, I worked for the Shelby County District Attorney's Office. I was able to get a practice license only towards the end of the summer, but I was still able to conduct a few preliminary hearings, and I conducted numerous interviews, engaged in some interesting research, and was able to watch a few jury trials, as well as some other hearings. I then enrolled in the Mississippi Innocence Project clinic last semester, and enjoyed doing that work. Prior to law school, I interned with a number of museums and public history organizations that allowed me to draft some loan renewal documents, and engage in some research and writing projects, two of which remain on the project's website.

While I was not on the Law Journal, I have had numerous occasions to develop my writing skills, with two mandatory classes focusing on memo and brief writing, and one elective requiring me to write a longer essay style paper. I drafted several briefs while working for the Ross Firm. And my undergraduate studies required several essays every semester.

I would appreciate the opportunity to meet with you to discuss my qualifications for this position. Please contact me at 540-272-1424, or carter.d.stewart.44@gmail.com if you have any questions. Thank you in advance for your time.

Sincerely,
Carter Stewart

Carter Davis Stewart

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Education

University of Mississippi School of Law, Oxford, MS
Juris Doctor Candidate, May 2022
GPA: 3.78; Rank 16/151 (Top 11%)
- Dean's Scholarship

Christopher Newport University, Newport News, VA
Bachelor of Arts in History, cum laude, May 2018
GPA: 3.58
- Eta Sigma Phi (Classical Studies Honor Society)

Legal Experience

Sullivan County District Attorney General's Office, Blountville, TN
Intern, Dec 2021-Jan 2022
- Observed court proceedings
- Calculated restitution
- Examined jail calls
- Conducted legal research

The George C. Cochran Mississippi Innocence Project, Oxford, MS
Student Clinician, Aug 2021-Dec 2021
- Evaluated applications against the standards used for selecting cases
- Made recommendations for accepting or rejecting applications
- Visited local court to research trial information

Shelby County District Attorney General's Office, Memphis, TN
Intern, May 2021-Aug 2021
- Conducted preliminary hearings
- Observed court proceedings
- Interviewed witnesses
- Conducted legal research

The Ross Firm, Santa Fe, NM (Remote Work)
Research and Drafting Assistant, Sep 2020-Nov 2020
- Drafted letters for Discovery disputes
- Drafted Briefs concerning consumer debt, insurance, and personal injury claims
- Researched legal and administrative matters relating to these documents

Smyth County Circuit Court, Marion, VA
Intern for Judge Deanis L. Simmons, May 2020-Aug 2020
- Researched legal issues concerning many different topics
- Summarized parts of the legislative update
- Read and discussed cases with Judge Simmons
- Researched history of a courthouse monument for potential legal issues
- Summarized orders relating to the pandemic
- Observed proceedings

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Any questions regarding the accuracy of this transcript can be directed to the Office of the University Registrar. All transfer work is reflected in hours earned. Only course work attempted at the University of Mississippi is posted on the official transcript.

Print Date: January 19, 2022

---------- Academic Program ----------

Current Program:: Juris Doctor
College/School: School of Law
Major - Juris Doctor Law

---------- Degrees Awarded ----------

-------- Transfer Credit --------

Name	Dates of Attendance
Christopher Newport University	08/15/2014 - 05/12/2018

---------- Beginning of Records ----------

Fall Semester 2019
Law

Course	Description	Attempt	Grade
Law 503	Civil Procedure I	3.00	A
Law 501	Contracts	4.00	A
Law 514	Legal Research and Writing I	4.00	B
Law 502	Torts	4.00	A-

SEM: ATM 15.00 ERN 15.00 GRD 15.00 PTS 54.80 GPA 3.65
CUM: ATM 15.00 ERN 15.00 GRD 15.00 PTS 54.80 GPA 3.65

Winter Intersession 2020
Law

Course	Description	Attempt	Grade
Law 590	Contract Negotiation and Drafting	3.00	B

SEM: ATM 3.00 ERN 3.00 GRD 3.00 PTS 9.00 GPA 3.00
CUM: ATM 18.00 ERN 18.00 GRD 18.00 PTS 63.80 GPA 3.54

Spring Semester 2020
Law

Course	Description	Attempt	Grade
Law 507	Constitutional Law I	3.00	P
Law 568	Criminal Law	3.00	P
Law 515	Legal Research and Writing II	2.00	P
Law 504	Property	4.00	P
Law 577	Civil Procedure II	3.00	P

SEM: ATM 15.00 ERN 15.00 GRD 0.00 PTS 0.00 GPA
CUM: ATM 33.00 ERN 33.00 GRD 18.00 PTS 63.80 GPA 3.54

Full Summer Session 2020
Law

Course	Description	Attempt	Grade
Law 771	Advanced Legal Topics I	1.00	Z

SEM: ATM 1.00 ERN 1.00 GRD 0.00 PTS 0.00 GPA
CUM: ATM 34.00 ERN 34.00 GRD 18.00 PTS 63.80 GPA 3.54
Law 771: Intermediate Legal Research

Fall Semester 2020
Law

Course	Description	Attempt	Grade
Law 508	Constitutional Law II	3.00	A
Law 600	Evidence	3.00	A+
Law 613	Income Taxation of Individuals	3.00	A-
Law 635	Criminal Procedure I: Investigation	3.00	A-
Law 516	Wills and Estates	3.00	A

SEM: ATM 15.00 ERN 15.00 GRD 15.00 PTS 59.10 GPA 3.94
CUM: ATM 49.00 ERN 49.00 GRD 33.00 PTS 122.90 GPA 3.72

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Any questions regarding the accuracy of this transcript can be directed to the Office of the University Registrar. All transfer work is reflected in hours earned. Only course work attempted at the University of Mississippi is posted on the official transcript.

Spring Semester 2021
Law

Course	Description	Attempt	Grade
Law 603	Legal Profession	3.00	A
Law 601	Corporations	3.00	A
Law 696	Federal Jurisdiction	3.00	A+
Law 712	Advanced Legal Writing	3.00	B+
Law 714	Criminal Procedure II: Adjudication	3.00	A

SEM: ATM 15.00 ERN 15.00 GRD 15.00 PTS 58.80 GPA 3.92
CUM: ATM 64.00 ERN 64.00 GRD 48.00 PTS 181.70 GPA 3.78

Fall Semester 2021
Law

Course	Description	Attempt	Grade
Law 558	Bankruptcy	3.00	A-
Law 646	Children In The Legal System	3.00	A
Law 692	Clinics: Innocence Project	3.00	A
Law 721	Capital Punishment and the Judicial Pro	3.00	A-
Law 726	Health Care Law	3.00	A-

SEM: ATM 15.00 ERN 15.00 GRD 15.00 PTS 57.30 GPA 3.82
CUM: ATM 79.00 ERN 79.00 GRD 63.00 PTS 239.00 GPA 3.79

---------- End of Transcript ----------

[This is the final draft of my writing project for the Advanced Legal Writing Class, Spring Semester, 2021]

IN THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

JANE HANSEN, INDIVIDUALLY, **PLAINTIFF**

AND AS THE NATURAL MOTHER AND NEXT FRIEND

OF HOLLY HANSEN, A MINOR

VS. **CV2019-501**

CITY OF OXFORD **DEFENDANT**

Brief in Support of Defendant's Motion for Summary Judgment

Introduction

While responding to an emergency call, Officer Green struck the vehicle of Ms. Hansen as she was proceeding through an intersection. As a result, Ms. Hansen brought this suit for damages against the City of Oxford (the City) for "negligence, gross negligence and reckless disregard for the safety of others[,]" as well as "negligence per se[.]" (Complaint, pg. 6-7 (capitalization removed).) But "immunity lies for negligence," under the Mississippi Tort Claims Act when a plaintiff sues a city regarding police conduct. *City of Clinton v. Tornes*, 252 So.3d 34, 38 (Miss. 2018). The Mississippi Tort Claims Act provides that Ms. Hansen must show that Officer Green acted with reckless disregard for the safety of other drivers in order to recover. Officer Green took numerous precautions to protect other drivers. He was negligent, at worst. Ms. Hansen alleges no facts that demonstrate a reckless disregard for the safety of others. The City of Oxford is entitled to judgment as a matter of law.

Facts

Officer Green was acting within the course and scope of his employment as a police officer for the City at all times during the relevant events. (Complaint, 2.) Prior to the accident, a call broadcast to officers informed him of a rollover accident on Highway 7. (Green Depo. pg. 8.) The call went out to all appropriate officers on duty at the time. (*Id*. at 37.) Though he was on the other side of town, Officer Green responded to this call. (*Id*. at 8.) He did not know if any other officers were able to respond. (*Id*. at 8-9.) Officer Green did not know how many injuries there were, but knew that the accident was particularly serious. (*Id*. at 42.) Officer Green travelled at 60 miles per hour, approximately twenty miles per hour faster than the speed limit. (*Id*. at 18.) He turned on his blue lights and siren, and kept them running as he travelled through two intersections. (*Id*. at 38.) He slowed down as he approached them. (*Id*.) He also "bumped," his siren, altering the sound to alert drivers that he was approaching the intersection. (*Id*.) He employed all of these safety measures again as he approached the third intersection, where he collided with Ms. Hansen. (*Id*. at 38-39.) The weather was bright and clear, the intersection was not known to be particularly dangerous, and the traffic flow seemed normal to Officer Green as he approached. (*Id*. at 41- 43.) He was travelling at 50 miles per hour as he entered. (*Id*. at 18.) Vehicles yielded to him. (*Id*. at 43-44.) Officer Green could not see all of the intersection, with obstructions to his view on the left side of the intersection. (*Id*. at 13.) He did not verify that the intersection was clear before he entered against a red light. (*Id*. at 14.) At the same time, Ms. Hansen, with her daughter, Holly, as a passenger, was approaching the intersection from Officer Green's left. (Hansen Depo. pg. 6.) She did not see or hear Officer Green as he approached. (*Id*.) She did not notice other vehicles yielding to Officer Green. (*Id*.) Ms. Hansen had a green light,

and proceeded to enter the intersection. (*Id*.) She heard Officer Green's siren just before he collided with her vehicle. (*Id*.) Ms. Hansen and her daughter, were taken to the hospital and released shortly afterward. (*Id*. at 8-9.) Ms. Hansen experiences lingering effects. (*Id*.) Officer Green could have done more to prevent this accident. But he did take measures to protect other drivers.

Discussion Section

The City of Oxford is entitled to Summary Judgment. The Mississippi Tort Claims Act explicitly states that governmental entities are not liable for acts and omissions committed by police officers "unless the [officer] acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury." Miss. Code Ann. § 11-46-9(c). Officer Green was on an emergency call, and entered the intersection at a reduced speed, running his blue lights and siren. (Green Depo. pg. 14, 38.) His actions demonstrated a concern for the well-being of others, and did not rise to the level of reckless disregard. Because his actions did not rise to the level of reckless disregard, Ms. Hansen's claims cannot prevail. The City is immune to Ms. Hansen's claims, and is entitled to judgment as a matter of law.

I. Because no material facts are in dispute and Officer Green did not act with reckless disregard, the City of Oxford is entitled to Summary Judgment.

Rule 56 of the Mississippi Rules of Civil Procedure states that Summary Judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Here, the parties agree on all material facts. Ms. Hansen heard Officer Green's siren and does not dispute Officer Green's account of safety measures. (See Hansen Depo. pg. 14.) Both Parties agree on Officer Green's speed. (Complaint, par. 9, Green Depo. pg. 13.) No other material detail is in dispute. Nothing in

these facts indicates that Officer Green acted with reckless disregard of the safety of others. Because Officer Green's conduct did not rise to the level of reckless disregard, the City is entitled to judgment as a matter of law.

II. Ms. Hansen does not allege facts showing reckless disregard in her claim for "Negligence, Gross Negligence, and Reckless Disregard for the Safety of Others." She cannot prevail under the Tort Claims Act.

The Mississippi Tort Claims Act waives Sovereign Immunity for the State of Mississippi and city governments within certain limits. Miss. Code Ann. § 11-46-5. In § 11-46-9, the Tort Claims Act lists exemptions for which it does not waive immunity. It states that immunity is not waived for damages:

> [a]rising out of any act or omission of an employee of a governmental entity engaged in the performance. . . of duties or activities relating to police. . . protection unless the employee acted in reckless disregard of the safety and well-being of [others].

Miss. Code Ann. § 11-46-9(c). Officer Green did not act with reckless disregard. And his conduct is more similar to those cases where officers were not liable because they showed some concern for the safety of other drivers than to those where officers ignored public safety, and were liable. *See Maldonado v. Kelly*, 768 So.2d 906, 910 (Miss 2000).

A. An officer acts with reckless disregard when he takes no action to protect against potential harm. When an officer takes precautions, his employer is immune.

Under the Tort Claims Act, "reckless disregard" requires that conduct be "'willful or wanton,' not merely negligent[,]" because "'immunity lies for negligence.'" *Tornes*, 252 So.3d at 38 (quoting *Maye v. Pearl River City*, 758 So.2d 391, 393-94 (Miss. 1999)). An officer must know that there is a risk involved in his conduct, disregard that risk, and demonstrate a "conscious indifference to consequences, amounting almost to a willingness that harm should follow." *Id*. (quoting *Rayner v. Pennington*, 25 So.3d 305, 309 (Miss. 2010)). This definition of

reckless disregard is a standard higher even than gross negligence. *City of Jackson v. Presley*, 40 So.3d 520, 523 (Miss. 2010). Reckless disregard is a standard only slightly lower than specific intent. *Maye v. Pearl River City*, 758 So.2d 391, 394 (Miss. 1999). Reckless disregard differs from negligence in that negligence is a failure to use sufficient caution, while reckless disregard is the failure to use any. *Maldonado*, 768 So.2d at 910. Courts make their determination of reckless disregard based on the totality of the circumstances. *City of Jackson v. Powell*, 917 So.2d 59, 71 (Miss. 2005).

The statute creates a high burden for plaintiffs to meet because the typical duties of police officers place them in unusually dangerous situations, likely to lead to liability, for the benefit of the public. *Maldonado*, 768 So.2d at 909. Public policy demands worse than negligent conduct before liability attaches. *Id*.

i. Courts often consider the seriousness of the harm to which officers are responding as well as police disciplinary measures to determine the reasonableness of the conduct.

In cases involving emergency calls, courts will ensure that officers only responded with high speed when necessary. *See Presley*, 40 So.3d at 524. An officer might act with reckless disregard if he initiates an emergency response for a trivial matter. *See Rayner*, 25 So.3d at 312. But responding to an unknown "disturbance" is sufficient to justify an emergency response. *Id*. As is responding to a medical issue of unknown severity. *Presley*, 40 So.3d at 524.

Further, violation of an internal police policy is not enough to make an officer liable. *Id*. Courts do not have to consider this factor unless there is a police pursuit. *Rayner*, 25 So.3d at 312-313. But some courts consider it without pursuit. *See City of Jackson v. Perry*, 764 So.2d 373, 379 (Miss. 2000) (stating that internal discipline factored into the Court's finding of reckless disregard). But this factor is not sufficient to find reckless disregard, without more. *Presley*, 40 So.3d at 524.

ii. Numerous cases show that municipalities are immune when officers show some concern for the well-being of other drivers, as Officer Green did here.

In general, cases involving traffic accidents may be divided into two categories. In the first, the officer displays some concern for the safety of others and so does not act with reckless disregard. *See Presley*, 40 So.3d at 524. In the second category, the officer shows no such concern, and the government is liable for the officer's conduct. *See Maye* 758 So.2d at 394 (Officer displayed "conscious indifference to the consequences," leading to an accident). Officers are only negligent if they fail to use sufficient caution, and reckless if they fail to use any. *Maldonado*, 768 So.2d at 910.

In the first category, officers used some caution, and so were not liable for the accidents they caused. See *Id*. The court in *City of Jackson v. Presley*, noted that the officer used her siren and blue lights, and crossed lanes one at a time. *Presley*, 40 So.3d at 524. "Such actions hardly can be characterized as reckless and indifferent to the safety of others." *Id*. at 521. The court then reversed the denial of the government's motion for summary judgment, even though the officer had entered into an intersection she knew was dangerous with a partially obstructed view, smashing into a vehicle that did not see her until the last second. *Id*. It did not matter that the intersection was dangerous, or that the officer violated internal policies. *Id*. at 524. In a similar case an officer responded to a call concerning a disturbance. *Rayner*, 25 So.3d at 307. He turned on his siren and his blue lights, stopped at a busy intersection, and, creeping forward slowly, collided with a driver who later sued his employer. *Id*. at 306. The officer knew he was in a dangerous position, and took actions to mitigate the danger. *Id*. at 311. The court again concluded that the government was entitled to summary judgment. *Id*. at 315.

Additionally, when an officer came to a dangerous intersection while not on an emergency call, looked both ways, and then entered, he demonstrated some concern for public safety. *Maldonado*, 768 So.2d at 911. He could not be held liable for the accident that followed. *Id*.

In addition to these cases, the Court of Appeals found no reckless disregard where an officer struck another vehicle while backing out of a parking space. *Vo v. Hancock County*, 989 So.2d 414, 417-418 (Miss. Ct. App. 2008). Even though there was a genuine dispute over whether the officer looked behind before backing out, the officer's conduct was negligent, at worst. *Id*.

iii. Officers who did not take any precautions, to protect others acted with reckless disregard, and the Tort Claims Act waived immunity for these cases.

In the second category of cases, the officers did not take actions to prevent harm. *See Id*. at 10. In *City of Jackson v. Perry* an officer was speeding while travelling to dinner, with no blue lights or siren, and struck another vehicle that was turning onto the road. *Perry*, 746 So.2d at 375. This officer acted with reckless disregard. *Id*. at 379. Similarly, an officer acts with reckless disregard when he turns onto a road at night without headlights, blue lights, or siren, hoping to catch suspects by surprise. *City of Jackson v. Lipsey*, 843 So.2d 687, 692-693 (Miss. 2003).

Further, an officer acts with reckless disregard when he makes a blind turn out of an alley at a high rate of speed. *Maye,* 758 So.2d at 395. Here, the court found the officer acted with reckless disregard based on his speed, since he could not know what was behind him, even if he had tried. *Id*. But three Justices dissented in this case, arguing that the officer was only negligent. *Id*. at 396. And the Court of Appeals distinguished *Maye* in *Vo*, despite the factual similarities. *Vo*, 989 So.2d at 418 (Holding that an officer was not worse than negligent for failing to look both ways before backing into another vehicle).

Finally, when an officer not on an emergency call failed to stop at a stop sign or yield the right of way, resulting in a fatal accident, the officer may have acted with reckless disregard.

Irwin-Giles v. Panola County, 253 So.3d 922, 925 (Miss. Ct. App. 2018). Whether or not the conduct amounted to reckless disregard was a matter of material fact for trial. *Id*. at 931.

B. Officer Green showed sufficient concern for the well-being of other drivers that his conduct cannot be considered recklessly indifferent in accordance with prior case law.

Officer Green's conduct did not amount to reckless disregard of the safety of Ms. Hansen, her daughter, or the other motorists. His conduct is analogous to the many cases in which the Mississippi Supreme Court has found summary judgment appropriate for defendants. The City is entitled to summary judgment because Officer Green acted with sufficient concern for the well-being of others that the Mississippi Tort Claims Act retains immunity.

i. Officer Green was responding to an appropriately serious call. Additionally, his disciplinary report is not enough to waive immunity.

Officer Green was on duty when he received a call about a rollover wreck with potential injuries. (Green Depo. pg. 8.) He did not know how many people were injured, or how many officers could respond. (*Id*. at pg. 8.) Officer Green knew he was responding to a particularly serious call with potentially serious injuries. (Green Depo. pg. 42.)

Officer Green had a good reason to treat this as an emergency. His conduct is similar to that of the officer in *Presley*. The officer in that case responded to a call of a man bleeding and lying in the street. *Presley*, 40 So.3d at 524. The Court considered this dangerous enough to merit an emergency response. *Id*. That emergency call was less serious than a rollover accident on the highway, with the potential for numerous life-threatening injuries. (See Green Depo. pg. 42.)

Officer Green's disciplinary report for his collision with Ms. Hansen is not enough to elevate his conduct to reckless disregard. The issuance of such a report is a factor courts have considered in determining whether to find reckless disregard. *Perry*, 764 So.2d at 379. But violation of internal police standards is not is not reckless disregard by itself. *Presley*, 40 So.3d at 524.

ii. Officer Green's conduct is most similar to that of officers who did not act with reckless disregard, despite causing accidents.

Officer Green took significant precautions as he traveled. His lights and siren were on, and he changed the tone of the siren just before entering the intersection, as he had with two prior intersections on that route. (Green Depo. Pg. 14, 38.) This is most analogous to *City of Jackson v. Presley*. The officer in *Presley* used her blue lights and siren while traveling to the bleeding subject of her call, and used her buzzer while entering a notoriously dangerous intersection. *Presley*, 40 So.3d at 524. The court held that her municipality was not liable for the accident that followed, even though the officer violated internal police policies. *Id*. The court stated that her use of the blue lights, siren, and buzzer "can hardly be characterized as reckless and indifferent to the safety of others." *Id*. Officer Green slowed down, used his blue lights and siren, and bumped his siren as he entered the intersection. (Green Depo. Pg. 14, 38.) His conduct is nearly identical to that of the officer in *Presley*. And the intersection where Officer Green collided with Ms. Hansen is not known as an exceptionally dangerous intersection among police officers. (Green Depo. pg. 43.) The City of Oxford should not be liable, just as the City of Jackson was not liable in *Presley*.

As in *Rayner* and *Maldonado*, Officer Green took measures to prevent an accident. In *Rayner*, the officer used his blue lights and siren, and stopped at a busy intersection, advancing slowly until he collided with another motorist. *Rayner*, 25 So.3d at 306-307. The officer in *Maldonado*, while not on an emergency call, looked both ways before crossing an intersection. *Maldonado*, 768 So.2d at 911. Just like these officers and the officer in *Presley*, Officer Green "took specific steps to avoid the collision." *Maldonado*, 768 So.2d 906, 911. Like those other officers, his measures failed. But the measures these officers took showed no "conscious

indifference to consequences, amounting almost to a willingness that harm should follow." *Rayner*, 25 So.3d at 309.

And Officer Green took more precautions than the officer in *Vo*. That officer did not act with reckless disregard by failing to look both ways before backing up. *Vo*, 989 So.2d at 417-418. Like this officer, Officer Green failed to ensure that the road was safe. (Green Depo. pg. 14.) But the officer in *Vo* could not have been liable even if he had failed to look behind him at all. *Vo*, 989 So.2d at 418. And Officer Green took numerous safety precautions beyond watching for traffic as he entered the intersection.

iii. Officer Green's conduct was not analogous to cases where immunity was waived under the Tort Claims Act.

Where courts have found liability, the officers failed to take precautionary actions. *See Maldonado*, 768 So.2d at 911.Their conduct was worse than negligent, and the conduct seemed to invite an accident. *Tornes*, 252 So.3d at 38. Officer Green did not demonstrate such indifference. Unlike *Irwin-Giles*, where there was a question of fact regarding reckless indifference, Officer Green was on an emergency call, and used his siren and blue lights appropriately. *See Irwin-Giles*, 253 So.3d at 925 (holding that an officer may have acted with reckless disregard by driving through a stop sign and failing to yield the right of way). The emergency situation similarly distinguishes *Perry*. *See Perry*, 746 So.2d at 375 (Finding reckless disregard when an officer sped to dinner with no blue lights or siren).

Officer Green did not demonstrate the same recklessness as the Officer in *Maye*, who backed through a blind alley at a high rate of speed. *Maye*, 758 So.2d at 395. Officer Green did make a turn without verifying that the intersection was clear. (Green Depo. Pg. 14**).** But he had his siren and blue lights on, slowed down, and changed the tone of his siren to warn drivers that he was

entering the intersection. (*Id*. at 14, 38.) Officer Green took precautions, and the officer in *Maye* took none. *Maye*, 758 So.2d at 395.

Additionally, Officer Green's conduct does not approach the level of an officer driving without lights or siren at night to surprise criminals, as in *Lipsey*. *Lipsey*, 843 So.2d at 692-693.

Officer Green may have been negligent as he drove into that intersection. But he employed numerous safety devices to protect the public, and reduced his speed as he approached. This conduct does not demonstrate the "willingness that harm should follow" that is necessary to find reckless disregard. *Tornes*, 252 So.3d at 38. Reckless disregard for the safety of others means acting without "any care." *Maldonado*, 768 So.2d at 911. If Officer Green failed to act with sufficient care, that is negligence, for which the City retains immunity. *See Id*.

III. Ms. Hansen's Count II, alleging Negligence Per Se, fails under the same standard as above. Ms. Hansen does not allege Reckless Disregard in this count.

Ms. Hansen alleges that the City of Oxford is liable because Officer Green's conduct was negligent per se. Even if Officer Green violated the statutes as alleged, negligence per se is still negligence and, for all the reasons explained above, "immunity lies for negligence." *Tornes*, 252 So.3d at 38.

Negligence per se allows a plaintiff to establish that the defendant failed to meet the standard of care of a reasonably prudent person because the Defendant violated a statute. *Williams ex rel. Raymond v. Walmart Stores East, L.P.*, 99 So.3d 112, 116 (Miss. 2012). It is nothing more or less than a claim for negligence. *Id*.

Ms. Hansen alleges that Officer Green violated three statutes. Section 63-3-315 requires emergency vehicles on emergency calls to slow down "as necessary for safety" at red lights. Miss. Code Ann. 63-3-315. It allows them to "proceed cautiously" through the signal. *Id*. Section 63-3-517 requires drivers of emergency vehicles to use blue lights and sirens on emergency calls.

Miss. Code Ann. 63-3-517. It does not relieve the duty to drive without reckless disregard for the safety of others. *Id*. Section 63-5-809 governs the response of other drivers to emergency vehicles. Miss. Code Ann. 63-3-809. Like section 63-3-517, it does not relive drivers of emergency vehicles from their "duty to drive with due regard for the safety of all persons using the roadway." *Id*.

Officer Green complied with all of these statutes. He ran his blue lights and siren while responding to the emergency call and slowed down when he approached the intersection (Green Depo. pg. 38.), complying with sections 63-3-315 and 517. Officer Green took numerous precautions out of regard for the safety of others, as explained above.

And even if he did violate these statutes in any way, the violation would only show a breach of the duty of care. *See ex rel. Raymond*, 99 So.3d at 116. But this is only a part of a claim for negligence. *Id*. Reckless disregard is a failure to show any concern for the safety of others, which is a higher standard than negligence's failure to show sufficient concern. *Maldonado*, 768 20.2d at 910. Because Ms. Hansen's second claim only alleges negligence, the law requires that it fail. *See* Miss. Code Ann. § 11-46-9(c).

Conclusion

Ms. Hansen's first count claims that Officer Green acted with reckless disregard for the safety of others, but the facts upon which she relies show nothing worse than negligence. Her second count does not even allege reckless disregard, but mere negligence. Because nothing in the facts indicate that Officer Green acted with reckless disregard for the safety of others, Ms. Hansen's claims are barred by the Mississippi Tort Claims Act. Miss. Code Ann. § 11-46-9(c). The City of Oxford is entitled to judgment as a matter of law. The Court should grant Summary Judgment accordingly.

Applicant Details

First Name	**Taylor**
Middle Initial	**A**
Last Name	**Story**
Citizenship Status	**U. S. Citizen**
Email Address	**taylorstory2016@gmail.com**
Address	**Address** Street **512 E Marigold Drive** City **Long Beach** State/Territory **Mississippi** Zip **39560** Country **United States**
Contact Phone Number	**(901) 239-5942**
Other Phone Number	**(901) 239-5942**

Applicant Education

BA/BS From	**University of Mississippi**
Date of BA/BS	**May 2018**
JD/LLB From	**The University of Mississippi School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=62501&yr=2011**
Date of JD/LLB	**May 8, 2021**
Class Rank	**15%**
Law Review/ Journal	**Yes**
Journal(s)	**University of Mississippi Sports Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Professional Organization

Organizations	**Missisppi Sports Law Review, Editor-in-Chief** **Phi Delta Phi International Legal Honor Society, President** **Federalist Society, Student Bar Association, Student Health Law Association, Member.**

Recommenders

Hensley, Desiree
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Roy, Lisa
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Fergusson, Molly
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662-915-6888

This applicant has certified that all data entered in this profile and any application documents are true and correct.

September 12, 2020

The Honorable Elizabeth W. Hanes
Magistrate Judge
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr., Federal Building and United States Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am writing to apply for a clerkship in your chambers for the 2021-2023 term. I am a rising third-year law student at the University of Mississippi School of Law.

My writing and research skills have been honed through my journal experience and through a position in the Housing and Advanced Housing clinics. In the clinics, I have specialized in the area of federal civil rights law, producing two federal complaints, two forty-plus page memos analyzing the implications of the First Amendment and various state law claims on federal civil rights claims, and one federal administrative agency complaint. I have also assisted in drafting a brief to the Mississippi Supreme Court questioning the constitutionality of a local municipality enforcing an ordinance allowing an individual to be deprived of property without due process. Currently, I am working on a law review article exploring an attorney's immunity from liability for violation of the federal Fair Housing Act. I believe my law school experiences have prepared me well for this opportunity, and it would be a great honor to clerk in your chambers.

For the summer I accepted placements with Judge Michael P. Mills of the United States District Court for the Northern District of Mississippi for the first half of the summer, and the United States Attorney's Office for the Northern District of Mississippi for the second half of the summer. Due to the outbreak of COVID-19 these placements have been rescheduled.

Please do not hesitate to contact me if you need any additional information. I can be reached at tastory@go.olemiss.edu or (901) 239-5942. Thank you for your time and consideration.

Respectfully,

Taylor A. Story

TAYLOR A. STORY

tastory@go.olemiss.edu
(901) 239-5942

SCHOOL ADDRESS:
211 Sweet Bay Drive
Oxford, MS 38655

PERMANENT ADDRESS:
3700 Stonetrace Circle
Bartlett, TN 38135

EDUCATION

University of Mississippi School of Law, J.D. expected, May 2021
GPA: 3.63; Class Rank: 21/145 (Top 15%)
Activities: Mississippi Sports Law Review, Editor-in-Chief
Phi Delta Phi Honor Society, President
Federalist Society
Student Health Law Association
Note: *Insider Baseball: The Legal Implications of Cheating in the Post Murphy Era of Legalized Real Time Sports Betting*

University of Mississippi, B.B.A., Managerial Finance, 2018
Activities: Associated Student Body Senate (2016-2017); President Pro Tempore (2017-2018)
Honors: Chancellor's Honor Roll and Dean's Honor Roll

LEGAL EXPERIENCE

UNITED STATES ATTORNEYS OFFICE Oxford, MS July-December 2020
Extern

LOW-INCOME HOUSING CLINIC, Oxford, MS Fall 2019/Spring 2020
Student Attorney
Assisted in researching and drafting a brief to the Mississippi Supreme Court regarding constitutionality of a housing ordinance; drafted discrimination complaint with HUD, including litigation documents, subpoenas for documents and testimony; drafted state court complaints, motions to continue and dismiss; participated in multiple depositions.

ALSAC/ ST. JUDE CHILDREN'S RESEARCH HOSPITAL, Memphis, TN Summer 2019
Law Clerk
Researched and drafted legal guidelines for the development of gift and loyalty card programs, state charitable gaming programs, and third-party platform fundraising agreements; monitored federal and state legislatures for potential changes affecting non-profits; reviewed event and service contracts, contract addendums, master service, and non-disclosure agreements.

ADDITIONAL EXPERIENCE

STATE SENATOR BRIAN KELSEY, Memphis, TN 2016
Campaign Field Director
Developed and implemented voter outreach plan covering the eighth congressional district; drafted policy position memoranda and talking points; organized public campaign and private donor events.

ALSAC/ST.JUDE CHILDREN'S RESEARCH HOSPITAL, Memphis, TN Fall 2016
Intern
Contacted donors, sponsors, and vendors to coordinate fundraising events; developed new and innovate events to support the hospital's mission; provided overarching logistical support for current fundraising events.

OFFICE OF U.S. SENATOR LAMAR ALEXANDER, Memphis, TN Summer 2015
Intern
Listened and responded to constituent concerns; attended community events with the Senators staff including immigration and Naturalization Ceremonies, and Rotary Club Meetings.

Taylor Story
The University of Mississippi School of Law
Cumulative GPA: 3.63

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure I	John M. Czarnetzky	B+	3.0	
Contracts	Stacey Lantagne	A-	4.0	
Legal Research and Writing I	Molly Fergusson and Scott DeLeve	B+	4.0	
Torts	Larry J. Pittman	B+	4.0	

Winter Intersession 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contract Negotiation and Drafting	David W. Case	B+	3.0	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure II	E. Farish Percy	B+	3.0	
Constitutional Law I	Michele Alexandre	A-	3.0	
Criminal Law	Michael Hoffheimer	A-	3.0	
Legal Research and Writing II	Molly Fergusson and Scott DeLeve	A-	2.0	
Property	Desiree Hensley	A	4.0	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Legal Writing	Mary Ann Connell Percy	A-	3.0	
Clinics: Housing	Desiree Hensley	A+	5.0	
Constitutional Law II	Lisa Shaw Roy	A	3.0	
Sports Law Review	William W. Berry III	X	1.0	Elected not to take the credit
Wills and Estates	I. Richard Gershon	B+	3.0	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Clinics: Advanced	Jordan B. Hughes	P	3	
Corporations	John M. Czarnetzky	P	3	
Criminal Procedure I: Investigation	Ronald J. Rychlak	P	3	
Evidence	E. Farish Percy	P	3	
Legal Profession	I. Richard Gershon	P	3	

Sports Law Review	William W. Berry III	X	0	Elected not to take the credit

Due to the COVID-19 outbreak the law school instituted a mandatory pass/fail grading system for the spring 2020 semester. No traditional letter grades were given.

Grading System Description

Grades With Point Values:
A+ 4.3
A 4.0
A- 3.7
B+ 3.3
B 3.0
B- 2.7
C+ 2.3
C 2.0
C- 1.7
D+ 1.3
D 1.0
D- 0.7
F 0.0

Grades With No Point Value:
Z- Pass
X- Audit
W- Withdrawn
I- Incomplete

Mandatory Grade Distribution for 1L Courses
A- to A+ = 15% Maximum
B- to A+ = 40% Maximum
C- to C+ = 35% Maximum
F to D+ = 5% Minimum
Required GPA for each class= 2.70 to 3.10

September 14, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to recommend Taylor Story to be a law clerk in your chambers. I am a professor of law at the University of Mississippi School of Law, where I teach Property, Real Estate, and the Low-Income Housing Clinic, which engages the students in providing professional legal services to real clients as a part of their legal education.

Taylor was in my Property class in spring 2019 and was one of a handful of students who received an A in the class. He enrolled in the Housing Clinic during the Fall 2019 and received an A+ for his work in that course. I've been teaching the Housing Clinic for eleven years and have given the A+ to only three students; Taylor is one of those three.

The grade that Taylor received in the Clinic was based upon my first-hand experience working with him on behalf of clients. While in the Clinic, he worked on a variety of landlord tenant matters and successfully settled a case. He worked on a case regarding an unenforceable mortgage and the Fair Debt Collection Practices Act, which he successfully resolved in about a month. He also took the lead on an emergency case involving illegal discrimination on the basis of disability under the Fair Housing Act. This involved quick and complicated fact investigation, drafting a complaint to HUD, and drafting a federal complaint and motion for a temporary restraining order.

Taylor is a tenacious and meticulous lawyer. He is a strong thinker and a decent writer. Whether he is assigned work or volunteers, he will uncover every source and explore every angle in order to figure out the best strategies and arguments. He will finish his work product on time and it will be edited and he will have suggestions about how to take it to another level.

Despite being so single-minded about this work, Taylor is also personable and easy to work with. He gets along with his professors and student colleagues, takes criticism well, and builds good relationships with clients. He really wants to be an excellent lawyer and colleague and that shows in how he handles himself on a daily basis. For these reasons I highly recommend him to be a law clerk in your office.

Please let me know if I can answer any questions.

Sincerely,

Desiree C. Hensley

dhensley@olemiss.edu

(202) 320-1307 (cell)

September 13, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write this letter to recommend Taylor Story, a third-year student at the University of Mississippi School of Law, for a position as a judicial clerk. Taylor is a joint J.D. and MBA candidate. I first met Taylor last fall when he was a student in my Constitutional Law II course covering the First Amendment. Taylor wrote a terrific exam and earned an A in the course; his exam ranked in the top 12% of exams in a class of 70 students.

Taylor has demonstrated solid academic and writing skills in other contexts as well. He has served as an Editor of the Sports Law Journal, and Taylor recently assumed the position of Editor-in-Chief of that journal. In addition, Taylor is the President of the Phi Delta Phi Honor Society.

At the law school Taylor is a well-rounded student with diverse interests and experience. He gained valuable hands-on experience in the Low-income Housing Clinic last fall, and he currently works in the Advanced Housing Clinic. Taylor is also a member of the Student Bar Association and the Student Health Law Association, and he has worked as a law clerk for St. Jude's Children's Research Hospital in his hometown of Memphis, Tennessee.

I have had the opportunity to talk and interact with Taylor, and he exudes an easygoing, professional demeanor. Taylor is also a hard worker who is thoroughly invested in his own learning. This spring Taylor scheduled a review of his 4.0 exam in Constitutional Law II, even though he had performed well on the exam. Taylor wanted to know whether there were any small areas in which he could improve his knowledge of the law. Overall, Taylor exhibits a combination of hard work, enthusiasm, and professionalism which would serve him well in a judge's chambers. If I can provide any additional information about Taylor, feel free to contact me by e-mail, at: lisaroy@olemiss.edu, or on my cellular phone, at (662) 801-5653.

Very truly yours,

/lsr/

Lisa Shaw Roy
Professor of Law and Jessie D. Puckett, Jr., Lecturer

September 12, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Please accept my endorsement of Taylor Story for a clerkship position with the Court.

I observed in the first year legal writing class Mr. Story's strong work ethic and his desire to succeed. Mr. Story actively participated in class, was always prepared, and with consistent work, developed the skills necessary to be an effective legal researcher and analyst. He demonstrated enthusiasm for the law, solicited criticism and responded gratefully to suggestions for improvement. He was always professional and able to adapt to diverse problems in multiple areas.

Mr. Story continues to be active in his coursework and at the law school. It has been my pleasure to know him. I would be happy to discuss why he would be a good fit for the Court should you need additional information.

Sincerest regards,

Molly Fergusson
Professor of the Practice of Law
University of Mississippi School of Law
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TAYLOR A. STORY

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WRITING SAMPLE

The following Brief in Support of Defendant's Motion Requesting Funds for an Expert Witness under the Authority of the Criminal Justice Act was the final assignment in my second year, first semester Advanced Legal Writing course. The brief is my own work product and has not been substantially edited by any other person.

In its original format, the brief is 20 pages long. For the purpose of serving as a writing sample, and as a means of reducing its length, this submission includes only the Introduction and Argument sections, so that the memorandum is now 15 pages long. A copy of the original complaint, in its entirety, is available upon request.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. EMMA JACKSON, Defendant.	Case No. 1:14-CR-002

Brief in Support of Defendant's Motion Requesting Funds for an Expert Witness Under the Authority of the Criminal Justice Act

Introduction

Emma Jackson ("Jackson"), an indigent defendant, requests funds under the Criminal Justice Act ("CJA") to hire Dr. Rachel Gray ("Dr. Gray") —a Battered Woman Syndrome ("BWS") expert— to assist in presenting her defense. Jackson—a victim of domestic violence— killed her boyfriend Jake Fussell in self-defense when he tried to attack her with a broken beer bottle. At trial, Jackson intends to raise a self-defense theory incorporating BWS. Denying the funds will prejudice Jackson's ability to present an adequate defense, violate her constitutional rights to due process and to the effective assistance of counsel, and render the trial unfair. Because Jackson is an indigent defendant and the presentation of a constitutionally

adequate defense requires it, this Court should grant her request for funds under the CJA to hire Dr. Gray.

Statements of Fact

---Omitted for Length Purposes----

Argument

I. This Court should grant Emma Jackson's request for funds because federal courts generally recognize the importance of an expert witness when Battered Woman Syndrome is a component of the proffered defense.

BWS itself is not a defense. Instead, it is traditionally offered in conjunction with other recognized defenses such as duress and self-defense. Federal courts consistently hold that an expert witness testimony is an indispensable element of a battered woman's presentation of an adequate defense.

In a Sixth Circuit case involving BWS, the court reversed the conviction because of counsel's refusal to request an expert witness to assist her defense. *Dando v. Yukins*, 461 F.3d 791, 793 (6th Cir. 2006). The defendant in the case had long been the target of physical and sexual abuse at the hands of the decedent. *Id.* at 798. The court acknowledged the importance of an expert witnesses' testimony in BWS cases. *Id.* at 801. An expert witness is necessary to

provide the jury context for its determination of the reasonableness of a battered woman's actions, and to explain the reasonableness of her fear and unwillingness to flee. *Id.*

Likewise, the Tenth Circuit—in two prominent cases— similarly recognized the importance of an expert witness in cases where BWS is a component of the proffered defense. In the first case, the court held that in BWS cases expert witness testimony is necessary to the jury's assessment of whether the defendant possessed the requisite mental state. *Dunn v. Roberts*, 693 F.2d 308, 314 (10th Cir. 1992). In the second case, the court remanded, holding counsel's failure to call an expert witness to support the self-defense claim—after eliciting testimony the defendant possessed features of a battered woman—deprived the defendant of the ability to adequately present her defense. *Paine v. Massie*, 339 F.3d 1194, 1196-1201 (10th Cir. 2003). The court opined that expert witness testimony is crucial to inform the jury on BWS, provide context of the reasonableness of a battered woman's fear, and present an expert determination as to whether a defendant suffered from BWS. *Id.* at 1202.

Similarly, the D.C. Circuit—in a BWS case where the defendant testified about being brutally beaten, controlled, and physically abused—reversed a conspiracy conviction because counsel did not offer expert witness testimony. *United States v. Nwoye*, 824 F.3d 1129, 1132-33 (D.C. Cir. 2016). The court held the failure to present expert witness testimony prejudices a defendant by depriving her "of any viable legal avenue to acquittal." *Id.* at 1140. As Judge

Kavanaugh explained, in BWS cases, expert witness testimony is necessary to enable the jury to assess the reasonableness of a defendant's actions in the context of a battered woman. *Id.* at 1136.

A. The Eighth Circuit is in accord with the Sixth, Tenth, and D.C. Circuits that without the assistance of an expert witness, the defendant will be unable to present an adequate defense.

Likewise, the Eighth Circuit, in two cases, recognized the indispensable role of expert witnesses in a battered woman's ability to present an adequate defense. In the first case, the court examined the importance of an expert witness to explain the behavior of a battered woman to the jury. *Arcoren v. United States*, 929 F.2d 1235, 1240 (8th Cir. 1991). In that case, the defendant alleged abuse to hospital staff, investigators and the grand jury. *Id.* at 1237. At trial she recanted. *Id.* at 1238. In response, the government called an expert witness to explain why battered women change their stories or recant. *Id.* at 1239. The court affirmed the admission of the expert testimony because it was necessary to explain why the defendant changed her testimony. *Id.* at 1240. As the expert witness explained to the jury the syndrome causes battered women to believe if they accept fault for the abuse, it will stop. *Id.*

In the second case, the court examined a BWS expert's role in a trial's sentencing phase. *United States v. Whitetail*, 956 F.2d 857, 862-64 (8th Cir. 1992). In that case, the court vacated the sentence of a battered woman, holding the trial court committed a reversible error by

failing to consider whether suffering from BWS warranted a downward departure in the sentencing phase. *Id.* at 864. The court extended its previous recognition of the important role of BWS in providing context for the actions of battered to the sentencing phase where the victim's actions, if they contributed to provoking the defendant, can warrant a downward departure. *Id.* at 863-4.

The Eighth Circuit is in accord with other federal circuits that in cases where BWS is a component of the proffered defense, the assistance of an expert witness is essential to the ability to present an adequate defense.

II. Emma Jackson is entitled to funds for an expert witness under the Criminal Justice Act.

A. Emma Jackson meets the two-prong test to receive funds under the Criminal Justice Act.

The Criminal Justice Act ("CJA") permits counsel of a financially deficient defendant to request funds for "expert… services necessary for adequate representation." 18 U.S.C. § 3006A(e) (2010). To receive funds, defendants must meet the two-prong test. *United States v. Schultz*, 431 F.2d 907 (8th Cir. 1970). First, they must lack the financial resources to obtain the requested services. *Id.* at 908. Second, the requested services must be necessary to proffer an "adequate defense." *Id.* Jackson satisfies both prongs.

First, Jackson lacks the financial ability to obtain the services of an expert witness. Fussell forced Jackson to rely solely on him for financial support. When a local art gallery owner offered Jackson a job and a car, Fussell refused to allow her to accept it. R. at 18:22-25. If she needed to make any purchases, including basic necessities like groceries and feminine hygiene products, she was forced to ask Fussell for the money. *Id.* at 19:17-19. Jackson's situation demonstrates a clear lack of financial resources to obtain the requested services.

Second, Jackson cannot develop an adequate defense without expert witness testimony. Criminal defendants must be provided the basic tools necessary to present an adequate defense. *Dunn*, 963 F.2d at 312 (citing *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)). When the defendant's mental state is a significant issue at trial, one of those basic tools that must be provided is the services of an expert witness. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

Jackson informed the court that she intended to incorporate BWS into her claim of self-defense. R. at 13:30-14:2. Self-defense requires determining the reasonableness of the defendant's belief of imminent danger and consequent action. *United States v. Milk*, 447 F.3d 593, 598 (8th Cir. 2006). The process of evaluating the reasonableness of a standard person's actions versus those of a battered woman differ and require an expert witness. Dr. Gray's testimony will account for the difference and establish context for the jury to evaluate the

reasonableness of her response as a battered woman response based on her history and perception of danger.

Because Jackson meets the CJA's two-prong to receive funds to hire Dr. Gray as an expert witness, denying Jackson the funds—when her mental state as a battered woman will be the significant issue at trial— deprives her of the basic tool necessary to present an adequate defense, rendering the trial unfair.

B. Denying Emma Jackson funds for an expert witness will result in an unfair trial.

The right to a fair trial and due process are bedrock principles of the nation's system of impartial justice. "[F]undamental fairness entitles indigent defendants" to the necessary resources to fairly present their claims. *Ake*, 470 U.S. at 77. Due process requires that defendants be provided the basic tools to fairly present an adequate defense. *Dunn*, 963 F.2d at 312.

The CJA requires a threshold showing of the reasonable probability the requested expert will aid the defense and that denial will result in an unfair trial. *United States v. Ross*, 210 F.3d 916, 921 (8th Cir. 2000). An expert witness is necessary to aid the jury in understanding the reasonableness of a battered woman's actions. *See*, *Dando v. Yukins*, 461 F.3d 791,793 (6th Cir. 2006); *Dunn v. Roberts*, 693 F.2d 308, 314 (10th Cir. 1992); *United States v. Nwoye*, 824 F.3d 1129, 1132-33 (D.C. Cir. 2016). The Supreme Court has held the principles of fundamental fairness

require financially depleted defendants be provided the necessary resources to fairly present their claims. *Ake*, 470 U.S. at 77. In *Ake*, the Court held that denying a defendant's request for an expert witness—after a preliminary showing that the defendant's mental state would be a significant issue at trial—violates the defendants' rights and renders the trial unfair. *Id.* at 74. Without Dr. Gray's testimony, Jackson will be unable to inform the jury on BWS, leaving the jury unable to evaluate the reasonableness of her actions in the context of a battered woman.

The Eighth Circuit affirmed the right to a fair trial enunciated by the Supreme Court. *Schultz*, 431 F.2d 907 (8th Cir. 1970) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). Once the record establishes that the defendant's mental state will be a significant issue, denying an expert witness deprives the defendant of the right to a fair trial. 431 F.2d at 911-12. When a defendant's mental state is the main issue at trial, the judicial system "cannot work successfully unless each party may fairly utilize the tool of expert medical knowledge to assist in its presentation to the jury." *Id.* at 911. Jackson's mental state will be a significant issue at trial; therefore, without an expert witness to assist in presenting the case to the jury, the trial will be unfair.

This Court should grant the motion because due process and the right to a fair trial demand that access to an expert witness be provided upon showing that the defendant's mental state will be a significant issue at trial. Denial of the motion prevents Jackson from

obtaining the assistance of Dr. Gray and prejudices her ability to receive due process and a fair trial.

C. Denying funds for an expert witness prejudices Emma Jackson's ability to present her case.

The Sixth Amendment guarantees criminal defendants "the right to . . . the assistance of counsel for [their] defense." U.S. Const. amend. VI. The "right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14. (1970). To prove ineffective assistance of counsel defendants must meet the two-prong test. *Strickland v. Washington*, 466 U.S. 688 (1984). First, "defendants must show that counsel's performance was deficient." *Id.* at 687. Second, "defendants must show that the deficient performance prejudiced the defense", depriving them of a fair trial with a reliable result. *Id.* Only the prejudice prong is relevant to this case.

To satisfy the prejudice prong, there must be a "reasonable probability that", without counsel's errors, the case would have turned out differently. *Id.* at 694. For example, the Tenth Circuit—in a BWS case reviewing whether counsel's failure to call an expert witness to support the petitioner's claim of self-defense constituted ineffective assistance of counsel—held such a failure rendered the jury unable to assess the reasonableness of the defendant's fear from the perspective of a battered woman. *Paine*, 339 F.3d at 1196-1204. The court remanded the case, noting that if Paine could produce a qualified expert existing willing to

testify she was a battered woman, explain the impact of BWS, and assert that she met the reasonable belief standard to use force in self-defense in the context of a battered woman, then the showing of prejudice would be complete. *Id.* at 1204-05.

The instant case is distinguishable from *Paine.* A qualified expert does exist—unlike in *Paine*— who is willing to testify that Jackson suffers from BWS, explain the impact of BWS on her state of mind, and opine as to Jackson's belief—based on the history of her relationship and prior violence—that from the perspective of a battered woman, the use of force was necessary to protect from imminent danger.

III. This Court should grant the motion because Dr. Gray's testimony is inextricably linked to Jackson ability to fairly develop and present her defense.

Dr. Gray's testimony is essential to Jackson's ability to fairly present her case. Without the testimony the jury will be uninformed on BWS, and unable to evaluate—in the context of a battered woman— the reasonableness of Jackson's belief of imminent danger and necessity of her actions. If convicted, Dr. Gray's testimony will be necessary to explain why a downward departure in Jackson's sentence is warranted. Three points demonstrate why Dr. Gray's testimony is fundamental to the fair presentation of Jackson's case.

A. Dr. Gray's testimony is imperative to inform the jury about Battered Woman's Syndrome.

Dr. Gray's testimony will explain BWS to the jury and establish Jackson's status as a battered woman. In BWS cases an expert witness is necessary to "explain[] to the jury the nature of battered woman's syndrome and give[] an opinion on whether petitioner suffer[s] from the syndrome." *Dunn,* 963 F.2d at 313-14. Such testimony assists in "interpret[ing] for the jury a situation beyond average experience and common understanding." *Id.* at 314. Dr. Gray will testify that Jackson was subjected to many of the traditional types of power and control used by abusers.

First, Fussell isolated Jackson from the outside world. Gray Aff. 5:10.2.1. She was forced to live in a remote area isolated from others, and not allowed to accept a job offered to her at a nearby art gallery or obtain her own vehicle. R. at 18:18-20.

Second, Fussell subjected Jackson to constant emotional, mental and physical abuse. Gray Aff. 5:10.2.2. Fearing she might leave him, he kept a tight leash on Jackson and frequently accused her of flirting with other men. R. at 18:25-28. Fussell constantly belittled and embarrassed her publicly and privately including in front of their friends. *Id.* at 19:8-16. He humiliated her at art shows and belittled her work to the extent that she gave up painting for good. *Id.* at 19:14-16. When she tried to cook dinner, he berated her for serving their guests "poor folks' food." *Id.* at 19:5-7. When Fussell drank, he resorted to name-calling, such as

"bitch" and "worthless hag." *Id.* at 21:8-12. The sheriff's department responded to numerous drunken domestic violence calls. *Id.* at 15:12-16. Often times—even when Jackson had visible bruises—deputies opted to pull Fussell aside and tell him to cut it out. *Id.* at 21:22. On one such occasion, though, deputies arrived to find Fussell had used a broken beer bottle to gash Jackson's face open. *Id.* at 21:24-27.

Third, Jackson suffered economic and financial abuse. Gray Aff. 5:10.2.3. Fussell forced Jackson to rely solely on him for financial support. When a local art gallery owner offered Jackson a job and a car, Fussell refused to allow her to accept it. R. at 18:22-25. If she needed to make any purchases, including basic necessities like groceries and feminine hygiene products, she was forced to ask Fussell for the money. *Id.* at 19:17-19. Upon finding out Jackson was pregnant, Fussell said that foreclosed any possibility of her ever being allowed to have a job. *Id.* at 19:27-30.

Fourth, Fussell employed intimidation tactics to maintain control over Jackson. Gray Aff. 5-6:10.2.4. When an argument erupted, Fussell would pull out a beer bottle—having previously used one to gash open Jacksons face—and begin waving in her direction to shut her up. R.at 21:12-13.

Fifth, Fussell threatened to take away Jackson's unborn child if she left him. Gray Aff. 6:10.2.5. He stated he would hire lawyers to tie up her up in a lengthy and costly custody

battle, and since she had no money, she would be unable to defend herself, meaning custody of the child would be his. R. at 21:10.

Sixth, Fussell held a privileged role, making all of the decisions in the relationship. Gray Aff. 6:10.2.6. He often stated that he was the "king of his castle", and the sole breadwinner of the family. R. at 20:25. Fussell decided whether or not Jackson could leave the house, since she was not allowed to have a car. *Id.* at 18:20-22. He also decided when and for what she could have money since she was not allowed to have a job. *Id.* at 19:17-19. Fussell's privileged role left Jackson powerless to make her own decisions.

B. Dr. Gray's testimony is an essential component of Jackson's self-defense claim because without her testimony, the jury is unable to evaluate the reasonableness of her fear or true belief the use of force was necessary in the context of a battered woman.

Self-defense requires a showing of the reasonableness of the belief of imminent harm or death and the necessity to use deadly force to prevent it. *Milk*, 447 F.3d at 598. Expert testimony provides context for the jury to consider whether a battered woman's perception of the danger and its imminence are reasonable given their circumstance. *Paine*, 339 F.3d at 1199 (citing *Bechtel v. State*, 840 P.2d 1 (Okla. Crim. App. 1992).

Dr. Gray's testimony is necessary to allow the jury to evaluate the reasonableness of Jackson's fear of imminent danger and the necessity to use deadly force to prevent it, in the context of a battered woman. Dr. Gray will testify that "a battered woman's appraisal of the

batterer's threat[ing] behavior can best be understood in terms of her unique history with the batterer." Gray Aff. 3:9.15. Her testimony provides the foundation for the jury to assess why Fussell's waving the beer bottle towards Jackson created a reasonable belief of imminent danger. Dr. Gray will testify that the reasonableness of Jackson's belief should be considered within the context of three events: Fussell's threat to take away her unborn child if she left, his previous use of a beer bottle to gash open her face, and the numerous law enforcement responses to domestic violence calls at their home. Without such testimony, the jury will be unable to properly evaluate the reasonableness of Jackson's fear and actions as a battered woman.

In the alternative, Jackson intends to present an imperfect self-defense theory incorporating BWS. An imperfect self-defense requires evidence of a true belief, even if unreasonable, that deadly force is necessary to prevent an imminent harm. *Milk*, 447 F.3d at 599. Proving the imperfect self-defense theory does not negate culpability for the homicide. *Id.* Instead, it bars a second-degree murder conviction because the defendant lacks the required mental state, justifying only a lesser conviction of manslaughter. *Id.* Dr. Gray's testimony is necessary for the jury to be able to properly evaluate the imperfect self-defense theory and assesses that Jackson's true belief force was necessary.

Without Dr. Gray's testimony, Jackson will be unable to adequately present either the perfect or imperfect self-defense theory, thereby depriving her of a fair trial or due process.

C. If a sentencing phase is necessary, due process demands Dr. Gray's assistance during it to explain why, based on her status as a battered woman, a downward departure in sentencing is warranted.

If the jury rejects Jackson's self-defense theories and convicts her of any charge, due process requires Dr. Gray assistance during the sentencing phase. The Supreme Court holds that a defendant's due process rights require "access to an expert witness for the purposes of examining the mental competency issue, testifying, and assisting during the sentencing phase." *Ake*, 470 U.S. at 84. If sufficient mitigating circumstances exist, then a downward departure is warranted. *Ross*, 210 F.3d at 926. Therefore, due process requires Dr. Gray to be able to assist during the sentencing phase to explain why Jackson's status as a battered woman provides sufficient mitigating circumstances to warrant a downward departure in sentencing.

In short, this Court should grant the motion because Dr. Gray's testimony is inextricably linked to Jackson ability to fairly develop and present her defense. Dr. Gray's testimony is imperative to inform the jury about BWS, an essential component of Jackson's self-defense claim, and a demanded due process right if a sentencing phase of the trial is necessary.

Conclusion

---Omitted for Length Purposes---

Applicant Details

First Name	**Emily**
Middle Initial	**H**
Last Name	**Sutherland**
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Address	**Address** Street **3451 University Parkway** City **Winston-Salem** State/Territory **North Carolina** Zip **27106** Country **United States**
Contact Phone Number	**7033003036**

Applicant Education

BA/BS From	**Virginia Polytechnic Institute and State University**
Date of BA/BS	**December 2017**
JD/LLB From	**Wake Forest University School of Law** **http://www.law.wfu.edu**
Date of JD/LLB	**May 16, 2022**
Class Rank	**20%**
Law Review/Journal	**Yes**
Journal(s)	**Wake Forest Journal of Law and Policy**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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wrightrf@wfu.edu
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George, Marie-Amelie
georgemp@wfu.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

3451 University Parkway
Winston-Salem, NC 27106

June 11, 2021

The Honorable Elizabeth W. Hanes
Eastern District of Virginia
Spottswood W. Robinson III and Robert R Merhidge, Jr. Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a rising third-year law student at the Wake Forest University School of Law, and I am writing to apply for a clerkship in your chambers for the 2022-2024 term. I am adaptable, organized, and passionate about legal research and writing, and am enthusiastic about bringing these skills to your chambers.

I have had a successful academic career at Wake Forest Law despite COVID-19's significant disruption to the regular course of business. When our classes moved to an online format, I adapted to the novel circumstances and prioritized organization. By maintaining focus while remaining flexible, I earned a 4.0 grade point average in five exam-based classes during Fall 2020, while simultaneously working as a remote intern for the Office of the Commonwealth's Attorney of Arlington County and the City of Falls Church. As a result, I improved my class rank from 96 to 26, moving into the top 20 percent of the class.

At the Office of the Commonwealth's Attorney, I sharpened my skills in researching and drafting legal memoranda, briefs, and motions. Because much of my work was submitted to the Circuit Court of Arlington County, I quickly learned the importance of clarity and concision in effective court writing—a lesson I have continued to hone and apply in my current summer internship. As Senior Executive Editor of the *Wake Forest Journal of Law and Policy*, I apply these skills to the publication's editing process. I make and review substantive edits within the article itself and the footnotes and citations. This role requires a meticulous attention to detail and a thorough understanding of *Bluebook* and *The Chicago Manual of Style*. I will bring these same clear, concise drafting skills, diligence, and commitment to every project I complete for the Court.

I would be grateful for the opportunity to serve as a judicial clerk in your chambers. Thank you for your time and consideration.

Sincerely,

Emily Hager Sutherland

EMILY HAGER SUTHERLAND

(703) 300-3036 | Sutheh19@wfu.edu | 3451 University Pkwy, Winston-Salem, NC 27106

EDUCATION

WAKE FOREST UNIVERSITY SCHOOL OF LAW, Winston-Salem, NC | May 2022
Juris Doctor Candidate | Rank: 24/203
- Merit Scholarship
- Dean Suzanne Reynolds Award for Constitutional Law II; Dean Suzanne Reynolds Award for Negotiation
- Vice Chair, Honor Council
- Senior Executive Editor for Volume 12, *Wake Forest Journal of Law and Policy*
- Member, Trial Bar

VIRGINIA TECH, Blacksburg, VA | December 2017
Bachelor of Arts in Philosophy; Minor: Spanish; Minor: Philosophy, Politics, & Economics
- Aaron Slack Memorial Diversity/Social Justice Scholarship
- Distinguished University General Scholarship
- Dean's List
- Women's Ultimate Frisbee
- Capstone Project, Philosophy, Politics, Economics, *A Critical Analysis of the Proposed Southern Border Wall*

PROFESSIONAL EXPERIENCE

VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, Charlottesville, VA | May 2021 – Present
Summer Law Clerk
- Research substantive and procedural legal issues related to habeas corpus representation and federal habeas corpus proceedings
- Draft briefs and motions submitted to the Eastern District of Virginia

OFFICE OF THE COMMONWEALTH'S ATTORNEY, Arlington, VA | June 2020 – January 2021
Summer Intern, Fall Extern
- Researched legal issues including appealability of particular trial court decisions, evidence admissibility, principle liability, and elements of substantive crimes including capital murder, breaking and entering, and malicious wounding
- Drafted legal memoranda, briefs, and motions submitted to the Circuit Court of Arlington County
- One of two summer interns asked to extend work into the fall because of high performance throughout the summer

STARBUCKS CORP., Arlington, VA | March 2018 – July 2019
Barista
- Worked in a fast paced, demanding job delivering exceptional customer service to the patrons of Starbucks and maintained the level of professionalism required in representing a large corporation
- Partner of the Quarter, Starbucks Corp: Q4 FY2018

FIERCEMARKETS, Washington, D.C. | May 2017 – August 2017
Intern
- Operated Salesforce, performed competitor research, analyzed sales performance through Microsoft Excel, organized campaigns for Life Sciences sales team each week
- Researched and reached out to prospective clients for the sales team
- Worked with the marketing team on a long-term data appending project that took leads from a Marketo database with no company type and inferred the company type from company name and email address in the life science vertical

DEMOCRATIC COORDINATED CAMPAIGN, Arlington, VA | June 2016 – November 2016
Intern
- Worked with the Democratic Coordinated Campaign of Arlington, Virginia and when the semester began volunteered with the Blacksburg Democratic party on Hillary Clinton's 2016 presidential campaign
- Registered voters, called volunteers and researched Arlington County's demographics, population density, and local events to maximize the visibility of Hillary Clinton's Campaign

INTERESTS

Cooking; gardening; ultimate frisbee

WAKE FOREST UNIVERSITY
SCHOOL of LAW

Student Name: **Emily Hager Sutherland**

ID: 06589863

Birthdate: 09/30

Entry Date: Aug 19, 2019

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Issued To:

Date Printed: 01-JUN-2021 Page: 1

Cumulative Rank: 24/203

Course Level: Law

Program : Juris Doctor
Major : Law

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
INSTITUTION CREDIT:						
Fall 2019						
LAW	101	Contracts I	3.00	A-	11.010	
LAW	103	Criminal Law	3.00	B+	9.990	
LAW	104	Civil Procedure I	3.00	B+	9.990	
LAW	108	Torts	4.00	B+	13.320	
LAW	110	Legl Analysis, Writing & Res I	2.00	A-	7.340	
LAW	112	LAWR I (Research)	0.50	B	1.500	
LAW	122	Professional Development	0.00	S	0.000	
Ehrs: 15.50 GPA-Hrs: 15.50 QPts: 53.150 GPA: 3.429						
Spring 2020						
Due to COVID-19, classes in Spring 2020 were graded on a credit/no credit basis.						
LAW	102	Contracts II	3.00	CR	0.000	
LAW	105	Civil Procedure II	3.00	CR	0.000	
LAW	111	Property	4.00	CR	0.000	
LAW	113	LAWR II (Research)	0.50	CR	0.000	
LAW	119	Legl Analysis, Writng & Res II	2.00	CR	0.000	
LAW	120	Constitutional Law I	3.00	CR	0.000	
LAW	122	Professional Development	1.00	CR	0.000	
Ehrs: 16.50 GPA-Hrs: 0.00 QPts: 0.000 GPA: 0.000						
Fall 2020						
LAW	200	Legislation and Admin Law	3.00	A	12.000	
LAW	207	Evidence	4.00	A	16.000	
LAW	209	Constitutional Law II	3.00	A+	12.000	
LAW	340	Externship	2.00	H	0.000	
LAW	405	Crim Procedure: Investigation	3.00	A	12.000	
LAW	409	Journal of Law and Policy	0.00	S	0.000	
LAW	600	Negotiation	2.00	A+	8.000	
Ehrs: 17.00 GPA-Hrs: 15.00 QPts: 60.000 GPA: 4.000						
Spring 2021						
LAW	203	Business Organizations	3.00	B+	9.990	
LAW	206	Taxation: Federal Income	4.00	A	16.000	
LAW	406	Crim Procedure: Adjudication	3.00	A-	11.010	
LAW	409	Journal of Law and Policy	2.00	CR	0.000	
LAW	478	Public Interest Adv - LAWR III	3.00	A-	11.010	
LAW	610	Trial Practice Lecture	0.00	S	0.000	
LAW	610L	Trial Practice Lab (P/F)	3.00	H	0.000	

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued: Ehrs: 18.00 GPA-Hrs: 13.00 QPts: 48.010 GPA: 3.693						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	67.00	43.50	161.160	3.704
TOTAL TRANSFER	0.00	0.00	0.000	0.000
OVERALL	67.00	43.50	161.160	3.704

********** END OF TRANSCRIPT **********

Display Unofficial Transcript

11/20/19 06:37 PM

This is NOT an official transcript. Courses which are in progress may also be included on this transcript.

Transfer Credit Institution Credit Transcript Totals

Transcript Data

STUDENT INFORMATION

Name : Emily H. Sutherland

Student Type: Continuing

Primary College: Liberal Arts and Human Sciences

Primary Major: PHIL - Philosophy

Minor(s): SPAN - Spanish
PPE - Philosophy, Politics, And Economics

***Transcript type:WEB is NOT Official ***

TRANSFER CREDIT ACCEPTED BY INSTITUTION -Top-

Sum I 2014: Advanced Placement

Subject	Course	Title	Grade	Credit Hours	Quality Points	
HIST	1024	Ancient History	T	3.000		0.00
HIST	1214	History of the Modern World	T	3.000		0.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	0.000	0.000	6.000	0.000	0.00	0.00

Unofficial Transcript

FS2014: Advanced Standing

Subject	Course	Title	Grade	Credit Hours	Quality Points	
ENGL	1105	First-Year Writing	T	3.000		0.00
MATH	1014	Precalc With Transcendental	T	3.000		0.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	0.000	0.000	6.000	0.000	0.00	0.00

Unofficial Transcript

INSTITUTION CREDIT -Top-

Term: Fall 2014

Primary College: Agriculture & Life Sciences

Primary Major: BCHM - Biochemistry

Academic Standing: Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points
BCHM	1014	Blacksburg	UG	Introduction to Biochemistry	P	1.000	0.00
BIOL	1105	Blacksburg	UG	Principles of Biology	B	3.000	9.00
BIOL	1115	Blacksburg	UG	Principles of Biol Lab	A-	1.000	3.70
CHEM	1035	Blacksburg	UG	General Chemistry	D+	3.000	3.90
CHEM	1045	Blacksburg	UG	General Chemistry Lab	A	1.000	4.00
ENGL	1204H	Blacksburg	UG	Honors Freshman English	A-	3.000	11.10
MATH	1025	Blacksburg	UG	Elementary Calculus	C-	3.000	5.10

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	14.000	36.80	2.62
Cumulative:	15.000	15.000	15.000	14.000	36.80	2.62

Unofficial Transcript

Term: Spring 2015

Primary College: Liberal Arts and Human Sciences

Primary Major: PHIL - Philosophy

Minor(s): SPAN - Spanish
PPE - Philosophy, Politics, And Economics

Academic Standing: Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points
PHIL	1304	Blacksburg	UG	Morality and Justice	A-	3.000	11.10
PHIL	2116	Blacksburg	UG	Ancient/Medieval Phil	B-	3.000	8.10
PHIL	2125	Blacksburg	UG	History of Modern Philosophy	B-	3.000	8.10
PSCI	2014	Blacksburg	UG	Intro to Political Theory	A	3.000	12.00
SPAN	2106	Blacksburg	UG	Intermediate Spanish	A	3.000	12.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	51.30	3.42
Cumulative:	30.000	30.000	30.000	29.000	88.10	3.03

Unofficial Transcript

Term: Fall 2015

Primary College: Liberal Arts and Human Sciences

Primary Major: PHIL - Philosophy

Minor(s): SPAN - Spanish
PPE - Philosophy, Politics, And Economics

Academic Standing: Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points
ECON	2005	Blacksburg	UG	Principles of Economics	C	3.000	6.00
PHIL	1504	Blacksburg	UG	Language and Logic	B+	3.000	9.90
PHIL	2115	Blacksburg	UG	Ancient/Medieval Phil	B	3.000	9.00
PHIL	3016	Blacksburg	UG	Political Theory	A	3.000	12.00
SPAN	3105	Blacksburg	UG	Gram/Composition/Conv	B	3.000	9.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	45.90	3.06
Cumulative:	45.000	45.000	45.000	44.000	134.00	3.04

Unofficial Transcript

Term: Spring 2016

Primary College: Liberal Arts and Human Sciences

Primary Major: PHIL - Philosophy

Minor(s): SPAN - Spanish
PPE - Philosophy, Politics, And Economics

Academic Standing: Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points
AAEC	3314	Blacksburg	UG	Environmental Law	A-	3.000	11.10
GEOS	1024	Blacksburg	UG	Resources Geology	B	3.000	9.00
GEOS	1034	Blacksburg	UG	Earth's Natural Hazards	C+	3.000	6.90
PHIL	3505	Blacksburg	UG	Modern Logic & Dev	B	3.000	9.00
PHIL	4334	Blacksburg	UG	Jurisprudence	B	3.000	9.00
SPAN	3106	Blacksburg	UG	Gram/Composition/Conv	B	3.000	9.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	18.000	18.000	18.000	18.000	54.00	3.00
Cumulative:	63.000	63.000	63.000	62.000	188.00	3.03

Unofficial Transcript

Term: Fall 2016

Primary College: Liberal Arts and Human Sciences

Primary Major: PHIL - Philosophy

Minor(s): SPAN - Spanish
PPE - Philosophy, Politics, And Economics

Academic Standing: Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points

HD	2314	Virtual	UG	Human Sexuality	C+	3.000	6.90
PHIL	2894	Blacksburg	UG	Intro Philosophy Politics Econ	A	3.000	12.00
PHIL	3454	Blacksburg	UG	Philosophy of Religion	B+	3.000	9.90
PHIL	4204	Blacksburg	UG	Philosophy of Mind	A	3.000	12.00
PSCI	3364	Blacksburg	UG	Con Law Civil and Pol Rights	A	3.000	12.00
SPAN	3304	Blacksburg	UG	Intro Hispanic Lit	A-	3.000	11.10

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	18.000	18.000	18.000	18.000	63.90	3.55
Cumulative:	81.000	81.000	81.000	80.000	251.90	3.14

Unofficial Transcript

Term: Spring 2017

Primary College: Liberal Arts and Human Sciences

Primary Major: PHIL - Philosophy

Minor(s): SPAN - Spanish
PPE - Philosophy, Politics, And Economics

Academic Standing: Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points
PHIL	4224	Blacksburg	UG	Epistemology	B+	3.000	9.90
PHIL	4884	Blacksburg	UG	Adv Philosophy Politics Econ	A	3.000	12.00
PSCI	3754	Blacksburg	UG	American Political Theory	B+	3.000	9.90
SPAN	3464	Blacksburg	UG	Mod Mexican/Central Am Cult Lt	A-	3.000	11.10
SPAN	3524	Blacksburg	UG	Intro Spanish Translation	A	3.000	12.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	54.90	3.66
Cumulative:	96.000	96.000	96.000	95.000	306.80	3.22

Unofficial Transcript

Term: Fall 2017

Primary College: Liberal Arts and Human Sciences

Primary Major: PHIL - Philosophy

Minor(s): SPAN - Spanish
PPE - Philosophy, Politics, And Economics

Academic Standing: Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points
ART	2385	Blacksburg	UG	Surv Hist West Art	A	3.000	12.00
PHIL	4015	Blacksburg	UG	Special Topics in Philosophy	A-	3.000	11.10
PHIL	4994	Blacksburg	UG	Undergraduate Research	A-	3.000	11.10
SPAN	3484	Blacksburg	UG	Mod Andean/S Cone Cult Lit	A	3.000	12.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	12.000	12.000	12.000	12.000	46.20	3.85
Cumulative:	108.000	108.000	108.000	107.000	353.00	3.29

Unofficial Transcript

TRANSCRIPT TOTALS (UNDERGRADUATE) **-Top-**

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	108.000	108.000	108.000	107.000	353.00	3.29
Total Transfer:	0.000	0.000	12.000	0.000	0.00	0.00
Overall:	108.000	108.000	120.000	107.000	353.00	3.29

Unofficial Transcript

June 04, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to recommend my student, Emily Sutherland, for a position as a law clerk in your chambers.

I taught Emily in my Criminal Law course during the Fall 2019 semester, her first semester in law school. I learned in that setting about her exceptional writing skills, work habits, and intellectual curiosity. Emily was always prepared and engaged during class discussions and exercises, and managed to see quickly and clearly through the fog that so often besets 1L students.

Emily also enrolled in two of my other courses during her 2L year: Evidence in the Fall 2020 semester and Criminal Procedure Adjudication in the Spring 2021 semester. She performed exceptionally well in both courses. I was particularly impressed with the trial brief that she wrote for an exercise in Criminal Procedure Adjudication. The task for students was to draft a brief to the trial judge in favor of a defense motion to declare misjoinder of offenses. Emily's brief was clearer and more persuasive than the great majority of briefs I have read from experienced licensed attorneys.

What most impresses me about Emily, however, is her externship work during this academic year. When it became clear that the pandemic would shift our classroom sessions online for the 2020-2021 academic year, she extended her summer internship with the Office of the Commonwealth's Attorney in Arlington, Virginia. Because my professional interests focus on prosecutor offices, I speak with her from time to time about her work. She has impressed me with her professionalism and perceptiveness about her assignments. I believe she will carry these good habits forward into all of her work.

Based on Emily's skill in legal analysis, her strength as a legal writer, and the professionalism she demonstrates in her externship, I believe that she would do excellent work as a law clerk in your chambers. If I can elaborate on anything I mentioned in this letter, please contact me at wrightrf@wfu.edu or at (336) 758-5727.

Best regards,

Ronald F. Wright
Needham Y. Gulley Professor of Criminal Law
Wake Forest University School of Law

June 01, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing this letter to enthusiastically recommend Emily Sutherland as a clerk for your chambers. I have known Emily since the first day of her 1L year, when she stepped into my Civil Procedure course. This past year, I have had the pleasure of supervising Emily in her externship and having her as a student in my Public Interest Advocacy course. Because I know Emily and her work extremely well, I can state with confidence that she will be a fantastic law clerk and an outstanding attorney.

Emily is a skilled research and writer. She demonstrated her significant talents this spring in Public Interest Advocacy, where she drafted a public policy paper and op-ed on gerrymandering. For those pieces, she conducted significant amounts of research and wove the wide array of information she uncovered into a cohesive, persuasive narrative. She effectively distilled the complicated issues that undergird gerrymandering so that a lay audience could understand the legal problem as well as the impediments to meaningful reform. Her work demonstrated her keen ability to effectively analyze legal issues as well as her talent as a writer.

Emily did not just produce a strong final work product – she diligently worked over the course of the semester to hone her analytic and writing skills. Emily submitted several drafts of her papers and, in each one, I saw how she carefully she incorporated the feedback I gave her. In the other classes I had with Emily, she asked thoughtful questions to ensure she understood the contours of the complicated doctrine she was learning.

As this should indicate, Emily has a strong work ethic. She comes to every class prepared and ready to learn. Her comments and questions reveal that she has put in a great deal of time reviewing the material prior to class, so she can get the most from the course session. Emily is also exceptionally organized, which is how she was able to successfully complete an externship and earn a 4.0 GPA in the fall—all while working on the Wake Forest Journal of Law and Public Policy and serving as vice chair of the law school's Honor Council.

Finally, and perhaps most importantly, Emily is a joy to have in class. Her quiet demeanor belies a boundless enthusiasm and her eager attitude is inspiring. She is remarkably conscientious and mature.

In short, I strongly recommend Emily to you. She will be a wonderful addition to your chambers. If I can be of any assistance in your review of her application, please feel free to contact me.

Sincerely,

Marie-Amélie George

Marie-Amlie George - georgemp@wfu.edu

EMILY HAGER SUTHERLAND
(703) 300-3036 | Sutheh19@wfu.edu | 3451 University Pkwy, Winston-Salem, NC 27106

The following is a memorandum I wrote during my fall internship with the Office of the Commonwealth's Attorney for Arlington County and the City of Falls Church. The names of the parties involved have been changed to protect confidentiality. This writing sample has been used with permission from the Office of the Commonwealth's Attorney. It has not been edited or contributed to by anyone other than myself.

QUESTIONS PRESENTED

1. Under Virginia and Fourth Circuit law, does a police officer have reasonable suspicion to conduct a K9 sniff on a vehicle when the driver is showing signs of nervousness, the driver has a history of being present on the scene of a drug overdose, and the passenger has a history of multiple drug charges?

2. Under *Rodriguez v. United States*, did the officer have authority to conduct a drug sniff absent reasonable suspicion when the facts do not suggest the length of the stop?

BRIEF ANSWERS

1. No. The combination of factors presented was not enough to meet the standard of reasonable suspicion in Virginia or the Fourth Circuit.

2. Without further information, it is not possible to say under the facts as presented whether the officer unlawfully extended the stop.

STATEMENT OF FACTS

In September, Officer John Smith stopped a vehicle for speeding in Arlington County. Officer Smith made a driver side approach and identified the driver as Mr. James Brown. During the stop, Officer Smith noted Mr. Brown's hands were shaking and he was sweating profusely. He ran Mr. Brown's information and learned Mr. Brown had previously been on the scene of a drug overdose. Officer Smith returned to the vehicle and then identified the passenger as Mr. Steven Jones. After identifying Mr. Jones, Officer Smith asked Mr. Brown if he was ok, which Mr. Brown said he was. Officer Smith was concerned with how much Mr. Brown was sweating. Officer Smith also noted multiple pill containers on Mr. Brown's key ring. Officer Smith then ran Mr. Jones's identification, and identified that Mr. Jones had multiple drug charges in his criminal history.

After identifying the two men and their respective drug related histories, and noting the apparent nervousness of the driver, Officer Smith called for a K9 unit to conduct a sniff on the vehicle. It is unknown whether or not the traffic stop was complete at the time of the sniff.

Officer Smith noted specifically in his report that he called for a narcotics K9 because of the nervous behavior of the driver and the drug history of the passenger. This memorandum will analyze whether those factors are enough to meet reasonable suspicion in Virginia and the Fourth Circuit.

DISCUSSION

I. Reasonable Suspicion

The circumstances of the stop are nervous and sweaty shaking of the hands; the passenger holding a bag tightly; the driver's presence at a drug overdose; the pill containers attached to the key ring; and the passenger's previous drug convictions. The officer based his call of the K-9 unit on nervousness and the passenger's previous drug convictions. Alone, these circumstances are not enough to meet the reasonable articulable suspicion standard.

Virginia and the Fourth Circuit have many cases that discuss nervousness as a factor, but have matched it with multiple other specific factors present like being stopped in a high crime area, *Walker v. Commonwealth*, 42 Va. App. 782, 791 (2004); the driver being known to deal drugs and having been previously stopped in an open-air drug market, *U.S. v. Branch*, 537 F.3d 328, 340 (4th Cir. 2008); having conflicting stories between the driver and the passenger, *U.S. v. Vaughan*, 700 F.3d 705, 707-08 (4th Cir. 2012), *U.S. v. Mason*, 628 F.3d 123, 129 (4th Cir. 2010); an extreme odor of air freshener, *Mason*, 628 F.3d at 129, *Branch*, 537 F.3d at 338; and coming from a known drug distribution city on a known drug route *Mason*, 628F.3d at 129. Each of these cases involved a driver's nervousness as a factor tending toward reasonable suspicion, but they all each involved other articulable, specific facts that in the totality led to the determination of reasonable suspicion. I do not think the two facts present that the officer

cited as his basis for the call, nervousness and the passenger's drug conviction history, tip the balance in favor of reasonable suspicion, however, reasonable minds could differ on this.

The Court of Appeals in *Walker v. Commonwealth* stated that circumstances that go towards the totality when determining if there was reasonable suspicion include "the nature of the area in which the stop occurred, the time of day, the conduct and demeanor of the suspect, and the type of offense that the officer was investigating[,]" as well as the perspective of the trained and experienced officer. *Walker,* 42 Va. App. at 791-92. Without knowing the nature of the area where Brown was stopped, the time of day, or the training and experience of the officer, it seems like the totality of the circumstances does not meet reasonable suspicion that criminal activity is afoot, specifically because the only facts being looked to were nervousness and previous interaction with drugs.

Notably similar to being on the scene of a drug overdose is *U.S. v. Branch,* in which the car the defendant was driving, which was not owned by the defendant, was previously pulled over in an area known to be an open-air drug market. The similarity here is that in both instances there was a prior contact with drugs in some capacity. However, the finding of reasonable, articulable suspicion rested on more factors than were present in the instant case. The *Branch* court cited: "the prior traffic stop of the Mercedes in a drug-trafficking area, Branch's evident nervousness, the presence of air fresheners, and the fact that Branch was driving a car not registered to him." *Branch*, 537 F.3d at 340. The defendant was also known to be a drug dealer. *Id.* at 339. The totality of these factors "could form the basis for a 'reasonable suspicion' of narcotics trafficking, and they certainly make it far from improper for [an officer] to inquire into the availability of a drug-detecting dog." *Id.* at 340. In this case, we do not have the presence of air fresheners or a defendant driving a car not registered to him, nor a defendant being a known

drug dealer, so it seems like there may not be enough to tip the scales to simply have nervousness and a previous contact with drugs, but again, reasonable minds could differ on this point.

Another analogy can be made in *McCain v. Commonwealth*. In *McCain*, the issue on appeal was not reasonable suspicion for a drug dog sniff, but reasonable suspicion for a *Terry* frisk. While the facts are different, it could be applicable in this situation. The pertinent facts are that an officer patrolling a high crime area saw two individuals enter into a house the officer had previously associated with drug activity months prior, and return to their vehicle after a few minutes. *McCain v. Commonwealth*, 275 Va. 546, 550 (2008). The officer then followed the two individuals and upon noticing an improper license plate frame and an unlawful traffic maneuver, pulled the vehicle over. *Id.* After asking for identification, which was given, the officer ordered McCain, the passenger, out of the vehicle, and requested to pat him down. McCain refused, and the officer proceeded to pat him down anyway. *Id.* at 550-51. The officer found a gun on McCain's person, searched him incident to arrest, and found cocaine in his pocket. *Id.* at 551. McCain appealed stating that he was unlawfully seized and searched. *Id.* In its discussion, the court stated that the defendant's "brief presence at a house the officer associated with drug activity months prior does not support a reasonable inference of criminal activity." *Id.* at 553. The court also stated that while the stop of the vehicle was lawful, the subsequent pat down was not. *Id.* The court determined there was no "reasonable suspicion of criminal activity implicating McCain" and the officer's hunch of drug involvement did not "rise to the level of reasonable suspicion." *Id.* at 554-55. The court also stated that nervousness "during the course of a traffic stop, standing alone, is insufficient to justify a frisk . . ., but . . . is a pertinent factor for consideration in assessing the totality of the circumstances. *Id.* at 554. *McCain* could be

analogized to the present case in that the only basis for the pat down, that McCain had contact with a house that previously was investigated for drugs, is similar to the present case in which the only two facts identified by Officer Smith was nervousness and a previous contact with drugs. If a *Terry* stop can be can be analogized to a K9 sniff, then there would be no reasonable suspicion based on the two factors to warrant such a sniff.

Also analogizing to *Commonwealth v. Smith*, where the passenger's history of being armed was pertinent to reasonable suspicion for a stop and frisk, it could be said that the passenger's drug history combined with the driver's nervousness could be factors tending toward reasonable suspicion. *Commonwealth v. Smith*, 281 Va. 582, 591 (2011). However, officer safety is of a different kind than drug interdiction, so there may be more weight given to a possibly armed and dangerous passenger than there is to a passenger previously convicted for drugs. The Supreme Court noted in *Rodriguez v. U.S.*, that "[h]ighway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular." 575 U.S. 348, 357 (2015).

II. Applicability of Rodriguez

The Court in *Rodriguez* did not determine whether or not there was reasonable suspicion to justify the defendant's further detainment, but *Rodriguez* seems applicable in this case in that if there was no reasonable suspicion, then the dog sniff unreasonably prolonged the traffic stop, but only if the traffic stop was already completed (license run, insurance checked, citation written). The Fourth Circuit has interpreted *Rodriguez* as permitting "officers [to] engage in other investigative techniques unrelated to the underlying traffic infraction or the safety of the officers . . . as long as that activity does not prolong the roadside detention for the traffic infraction." *U.S. v. Hill*, 852 F.3d 377, 382 (4th Cir. 2017). Without knowing whether the traffic

stop was already completed, or reasonably should have been completed before the sniff was conducted, I cannot say whether this unduly prolonged the roadside detention or not. If it did not unduly prolong the stop, it seems like the drug sniff would not need its own separate reasonable suspicion. *See Hill*, 852 F.3d at 382 (stating that a drug dog sniff can be conducted around a vehicle during a lawful traffic stop, but that the sniff "may not prolong the duration of the traffic stop absent consent . . . or reasonable suspicion").

The Virginia case law available does not tend to interpret *Rodriguez* in any way different from the Fourth Circuit, but little case law discusses *Rodriguez*. The Virginia Court of Appeals, in an unpublished opinion, recites the standards of Rodriguez and reinforces the idea that "a police officer 'may conduct certain unrelated checks during an otherwise lawful traffic stop,' but 'may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.'" *Johnson v. Commonwealth*, No. 1215-15-1, 2016 WL 6693910, at *4 (Va. Ct. App. Nov. 15, 2016) (quoting *Rodriguez v. United States*, 135 S.Ct. 1609, 1615, (2015)). So again, if the drug sniff was conducted within a reasonable time frame of the traffic stop, reasonable suspicion would not be needed. If, however, the sniff delayed the completion of the traffic stop, then reasonable suspicion is needed. As analyzed above, it does not seem like there was reasonable suspicion in the instant case.

CONCLUSION

Under available Virginia and Fourth Circuit law, Officer Smith did not have reasonable suspicion to conduct a K9 sniff on Mr. Brown's vehicle. The circumstances of nervousness and drug history alone were not enough to meet the standard of reasonable articulable suspicion needed to conduct a K9 search. Further, without knowledge of the length of the stop, it is unclear whether or not *Rodriguez* would apply in this situation.

Applicant Details

First Name	**JUSTIN**
Middle Initial	**J**
Last Name	**SWOFFORD**
Citizenship Status	**U. S. Citizen**
Email Address	**jjs966@psu.edu**
Address	**Address** Street **348 BLUE COURSE DR, Bldg 9 #327** City **State College** State/Territory **Pennsylvania** Zip **16803** Country **United States**
Contact Phone Number	**2094837509**

Applicant Education

BA/BS From	**California State University-Stanislaus**
Date of BA/BS	**May 2018**
JD/LLB From	**Penn State Law** **http://pennstatelaw.psu.edu/**
Date of JD/LLB	**May 22, 2021**
Class Rank	**20%**
Law Review/Journal	**Yes**
Journal(s)	**Penn State Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Gaines, David
dgaines@mkclaw.com
Kinports, Kit
kxk47@psu.edu
814-865-8907

References

The Honorable Erica R. Yew
Superior Court of California
County of Santa Clara
201 N 1st St., Dept. 62
San Jose, CA 95113
(408) 313-1390
eyew@scscourt.org

Adam Wardel
Simplus, Inc.
10 W. Broadway, Ste. 500
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Professor Benjamin Johnson
Penn State Law
Katz Building
University Park, PA 16802
(814) 867-2803
bbj14@pennstatelaw.psu.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

August 21, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a current 3L at Penn State Law and am writing to apply for a postgraduate clerkship in your chambers. Because of my extensive work and volunteer history, my drive to effect positive social change through my scholarship, and my collaborative nature, I am confident that I can contribute meaningfully to the Court's work. I am willing and able to relocate for the duration of this internship.

My professional history prior to law school was extensive. While still in college, I worked in three warehouses, two libraries, and also in the role of which I was proudest: as the coordinator of a team of youth commissioners who pitched, developed and broke ground on a multi-generational recreation and wellness complex. During this time, I also contributed articles on city issues to a local newspaper, a position I created from scratch by petitioning the paper's editor directly. My additional work involved a local nonprofit, where I mentored youths at an economically strained elementary school and learned how grassroots organizations can effect palpable change in their communities.

My industrious spirit has continued in earnest throughout my time at Penn State Law, where after my first year, I worked simultaneously for a California criminal court, a Utah corporation, and a Pennsylvania law professor. Serving in this 'tripartite' internship experience was challenging, but for me, such challenges had not been new. I worked my way through my undergraduate education as a first-generation college and law student who experienced the repercussions of the 2008 economic downturn firsthand. This undertaking also sharpened my ability to lead teams, to communicate concisely, and to manage complex projects simultaneously. Perhaps more importantly, it undergirded a desire to parlay my education into helping others navigate the legal process and profession. More recently, as a Summer Associate at a large law firm, I honed my presentational skills by completing a research project on the ethical issues of representing cannabis clients. Finally, I will gain further hands-on litigation experience this fall as a Judicial Extern for Judge William Arbuckle of the U.S. District Court for the Middle District of Pennsylvania.

As of late, I have geared my legal education toward societal and legislative reforms. My student note, *The Hazing Triangle: Reconceiving the Crime of Fraternity Hazing*, was recently published by the *Journal of College and University Law a*nd has been a vehicle for my desire to combat the dangerous issue of fraternity hazing through policy change. Although I had never been or known a fraternity member at the outset of this effort, the problem of fraternity hazing is exciting to tackle because of its complex history and the deeply entrenched values and institutional norms that perpetuate its existence. I have enjoyed the experience so much that I am currently in the early stages of crafting a 'sequel' article that will outline the constitutionality and policy prudence of a federal antihazing statute. I look forward to the coming day when I will be able to use this scholarly effort to help bring closure to the friends and family of hazing crime victims.

I would consider the chance to clerk with the Court to be a fulfilling capstone to my education as a budding litigator. I am excited to research and write about complex issues in the setting that only a judicial clerkship can provide. 'Solving the puzzle' of a difficult legal question is something that keeps me engaged in this work and thankful every day that I chose to come to law school. But more importantly, I am excited about clerking because, in doing so, I will be able to help the judicial process run efficiently and effectively. I welcome the chance to further discuss this position with you at your earliest convenience.

Warmly,

Justin J. Swofford

Justin J. Swofford

348 Blue Course Drive #327
State College, PA 16803

209.483.7509
jjs966@psu.edu

EDUCATION

The Pennsylvania State University, Penn State Law, University Park, PA
J.D., Expected May 2021
GPA: 3.41 Rank: 23/120
Penn State Law Review, Senior Editor
Honors: CALI Award for the highest grade in Constitutional Law I
Activities: Advocacy and Litigation Society, President (2019-2020)

California State University, Stanislaus, Stockton, CA
B.A., Communication Studies, May 2018

PUBLICATION

Note, *The Hazing Triangle: Reconceiving the Crime of Fraternity Hazing*, 45 J.C. & U.L. 296 (2020).

EXPERIENCE

United States District Court for the Middle District of Pennsylvania, Williamsport, PA
Judicial Extern to the Honorable William I. Arbuckle, III, August 2020 — Present

- Research substantive and procedural issues related to pending motions
- Draft bench memoranda, memorandum opinions, and orders in civil cases

Sherman & Howard L.L.C., Denver, CO
Summer Associate, June 2020 — July 2020

- Drafted memoranda on wide-ranging issues, including nuances of filing interlocutory appeals, enforceability of discretionary contract clauses, sanctions for spoliation by nonparties, the *Spearin* doctrine, mechanic's liens, and redemption of collateral after default under the Uniform Commercial Code
- Delivered "Capstone Project" presentation on proposed amendments to firm's policy on cannabis client representation

Miller, Kistler & Campbell, State College, PA
Extern, January 2020 — May 2020

- Drafted state and federal court briefs in support of preliminary objections, motions to quash, and motions for equitable tolling
- Drafted research memoranda for senior counsel regarding ongoing medical malpractice litigation

Santa Clara County Superior Court, San Jose, CA
Judicial Intern to the Honorable Erica R. Yew, June 2019 — August 2019

- Researched criminal law and procedure issues, both state and federal, and prepared bench memoranda for drug court judges on pending suppression motions related to knock-and-announce violations, statutory interpretation questions, and *Terry* stops

Simplus, Inc., Salt Lake City, UT
Legal Intern – Office of General Counsel, June 2019 — August 2019

- Performed compliance research and implementation through oral presentations and written memoranda
- Revamped company's Internet privacy policy, created employment agreement template for newly introduced position, and served as temporary liaison for staff during General Counsel's absence

The Pennsylvania State University, Penn State Law, University Park, PA
Research Assistant to Professor Benjamin Johnson, June 2019 — August 2019

- Analyzed financial disclosures and dockets of over 100 federal judges for longitudinal study of judicial ethics
- Reviewed citations in Professor Johnson's scholarly work for consistency with Bluebook conventions

California State University, Stanislaus, Stockton, CA
Library Assistant, August 2017 — May 2018

- Assisted students and faculty members with technical and research issues as the sole employee at the extension campus branch of University library and computer lab; managed inventory of reference and reserve materials

Amazon, Tracy, CA
Fulfillment Associate, July 2014 — June 2015

- Processed and stowed inbound goods, sorted shipments, packed outgoing trucks, and trained new associates

City of Lathrop Parks and Recreation, Lathrop, CA
Recreation Supervisor, June 2010 — June 2014

- Mentored and coordinated teen advocacy group in successful lobbying and fundraising campaign to open multi-generational recreation complex; managed weekend operations of community center, senior center, and city parks single-handedly

INTERESTS

Team Trivia, Greek Life Reform

JUSTIN SWOFFORD
Penn State Law
Cumulative GPA: 3.41

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Applied Legal Analysis & Writing I	Baumer	A-	3	
Civil Procedure	Muchmore	A-	4	
Criminal Law	Kinports	B	3	
Legal Research Tools & Strategies	Ham	B	2	
Torts	Lopatka	B	4	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Applied Legal Analysis & Writing II	Baumer	A-	2	
Constitutional Law I	Romero	A	3	
Contracts	Reilly	B	4	
Criminal Procedure	Sanders	B+	3	
Property	Colburn	B+	4	

CALI Award for Constitutional Law I

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Class Actions Seminar	Smith	A+	2	
Common Law Reasoning & Statutory Interpretation Seminar	Ross	B+	3	
Federal Courts	Johnson	B+	3	
Member PSU Law Review	Kinports	CR	1	
Professional Responsibility	Grosse	A	3	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Business & Financial Concepts	Reilly & Sharbaugh	CR	1	
Civil Pretrial Practice & Advocacy	Vollmer	CR	3	
Evidence	Hayes	CR	3	
Externship Placement	Balachandran	CR	3	
Law of Employee Benefits	Whitehead	CR	3	
Member PSU Law Review	Kinports	CR	1	

Mandatory credit/no credit grading for this semester due to COVID-19.

Grading System Description
1. All required courses:
Median = B.
Mean = 2.9-3.1.
Expect 15% A and A-.
Expect 15% C+ and below.
Expect 3-7% D and below.
2. Elective classroom courses (30+):
Median = B.
Mean = 2.9-3.2.
Expect 15% A and A-.
Expect 15% C+ and below.
3. Seminars, small classes, etc.
Median = B+.
Mean = 3.0-3.6.
No expectations.

August 21, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

The purpose of this letter is to enthusiastically recommend Justin Swofford to serve as a clerk under your supervision. Justin is a familiar face around our firm, who is known as much for his intellect as his professionalism. He will, without a doubt, fill this position with the dedication and competence that it deserves.

Justin commenced working as a clerk at our firm this past January, and, when the COVID-19 crisis occurred, he increased his work well beyond the originally contemplated hours. Although we are a small firm, our cases are complex and require an acute attention to detail. During his time spent with our firm, Justin led efforts to prepare for depositions in a series of medical malpractice matters and then review those depositions and their corresponding action items with our insurance adjustment counsel's office. Justin also organized our efforts to defend against federal civil rights claims involving a municipal police department client. Throughout those proceedings, Justin proficiently conducted his own legal research on the relevant issues, prepared motions and associated briefs, and communicated with the clients regarding the strengths and weaknesses of their defenses. His written materials required little to no editing.

We do not typically endorse a candidate in the manner that we endorse Justin. To reiterate what is set forth above, Justin is an excellent researcher and writer, and he would be a great asset to your chambers. Overall, it has been a pleasure to work with Justin, and I recommend him to you with confidence that he will do an excellent job and make the most of this experience.

On behalf of Justin, I thank you for your consideration. Please do not hesitate to let me know if you have any further questions.

Very truly yours,

David S. Gaines, Jr.
Miller, Kistler & Campbell
720 South Atherton Street, Suite 201
State College, PA 16801
(814) 234-1500
dgaines@mkclaw.com

August 24, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes

I am writing in support of Justin Swofford's application to clerk in your chambers following his graduation from Penn State Law in May of 2021. Justin is a very good student and a genuinely nice person, and I believe that he would be a very good law clerk.

I first met Justin during the Fall semester of his first year of law school, when he was enrolled in my Criminal Law course. Justin performed at a high level in my course. His final exam was organized and well-written, and it showed a good understanding of the course materials.

Justin was also a valuable participant in the classroom discussion in my course. His questions and comments were articulate and thoughtful, and they demonstrated that he had devoted the time necessary to come to school well-prepared for class.

I was also impressed that Justin took the initiative to submit a paper he wrote on hazing to outside law journals, and I was thrilled when it was accepted for publication by the Journal of College and University Law. As you know, it is not easy for law students to have their work accepted for publication by any outside journal, much less a refereed one like the journal that is publishing Justin's work.

On a personal level, Justin is sincere, down-to-earth, and friendly, and he seems to be a kind individual who is concerned about others. In addition, Justin is not afraid of hard work, and he has held an admirable number of jobs while attending college and law school. I think you would find that Justin would work well with, and get along well with, you and the others in your chambers.

In sum, I believe that Justin has the legal ability, the written and oral communication skills, and the dedication necessary for a judicial clerkship, and I am happy to recommend him to you without any reservation. Please do not hesitate to contact me if I can provide any additional information.

Very truly yours,

Kit Kinports
Professor of Law and Polisher Family
Distinguished Faculty Scholar
Penn State Law
814-865-8907
kxk47@psu.edu

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOSEPH SHINNER Plaintiff	))	CIVIL ACTION
v.	)	
CLAYTON TOWNSEND Defendant	))	Dkt. No. 18-2134

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Statement of Facts

Clayton Townsend is a service award-winning police officer for the Commonwealth of Pennsylvania. (R. at 12.) He has served the Commonwealth since 2001 and was promoted to the rank of Sergeant in 2009. (R. at 7.) The Borough of State College awarded Mr. Townsend a medal of honor for the rescue of two families from a burning building in 2016. (R. at 12.)

On September 15, 2018, Mr. Townsend attended a Penn State football game at Beaver Stadium in State College, Pennsylvania. (R. at 7.) He was accompanied by his ten-year old son, Joey. (R. at 7.) During the game's halftime, Mr. Townsend and other officers in attendance were honored in a ceremony on the field as part of the stadium's Police Officer Appreciation Day. (R. at 7.) Although Mr. Townsend was in fact on-duty during the halftime field ceremony, the purpose of this on-duty time was to fulfill a number of "community building hours" required of all officers. (R. at 7.) Accordingly, Mr. Townsend wore his uniform and duty belt during the ceremony. (R. at 9.) However, at all other times during the game, he kept his duty belt in a bag and wore a football jersey over his police uniform and badge. (R. at 8.)

While sitting in the stands during the game, he told two individuals, including the plaintiff, that he was off-duty. (R. at 10.) He also sat with his son and friends during the game,

instead of in the area of the stadium set aside for police officers. (R. at 8.) Pennsylvania State Police Manual Rules permit Mr. Townsend to carry his police-issued handgun and handcuffs to or from authorized places of duty. (R. at 16.) However, Mr. Townsend did not bring his gun to the stadium. (R. at 8.) He did bring two foam hands, for he and his son to wear, which said "Penn State #1." (R. at 8.)

During the time Mr. Townsend was watching the game from the stands with his son, his view of the field was repeatedly blocked by the plaintiff, who swore, shouted, and appeared to be intoxicated. (R. at 9.) Mr. Townsend asked the plaintiff several times to remain seated, but he continued to rise from his seat, and began to distract other fans in the surrounding seats. (R. at 9.) The plaintiff told Mr. Townsend that he was "off-duty and he needed to back off." (R. at 4.) After the halftime ceremony, Mr. Townsend returned to the stands to find his son Joey in tears because the plaintiff's movement prevented him from watching his father. (R. at 9.) To remedy the situation, Mr. Townsend allowed Joey to hold the handcuffs that had been concealed in his bag. (R. at 10.) Meanwhile, the plaintiff's behavior continued to aggravate Mr. Townsend and the surrounding fans, as the plaintiff honked a horn and threw string which landed in Mr. Townsend's beverage. (R. at 10.) Mr. Townsend tried again to speak to the plaintiff, who then approached and yelled at Mr. Townsend. (R. at 10.)

A security attendant briefly intervened after Mr. Townsend tried to pacify the plaintiff with a quick touch of his foam hand. (R. at 10.) After the attendant left, the plaintiff continued to ignore Mr. Townsend's verbal requests to stay seated. (R. at 11.) Mr. Townsend placed the chain of his handcuffs around the plaintiff's legs and pulled in an attempt to bring him to his seat. (R. at 11.) The plaintiff lost his balance and fell. (R. at 11.) At no time did Mr. Townsend threaten to arrest the plaintiff. (R. at 12.) Mr. Townsend, in response to the plaintiff's claim against him

under 42 U.S.C. § 1983, now files a Motion for Summary Judgment on the grounds that the plaintiff cannot establish that Mr. Townsend acted under the color of law, a requirement under the statute. (R. at 19.)

Question Presented

I. Under 42 U.S.C. § 1983, should the Motion for Summary Judgment be granted on the grounds that Mr. Townsend did not act under color of state law when he attended the event with his child; when the incident occurred while he wore plain clothes; when he did not threaten to arrest or attempt to arrest the plaintiff; when he did not verbally invoke police authority at any point during his interaction with the plaintiff; when the incident occurred while Mr. Townsend was off-duty; when handcuffs were used not to detain, but merely to trip the plaintiff; when he declined to bring a gun to the event despite department authorization to do so; and when, except for handcuffs, no other police indicia were present during the incident?

Argument

I. The Motion for Summary Judgment should be granted because Mr. Townsend's interaction with the plaintiff was of a private nature and was not precipitated or influenced by his role as a police officer, thus distinguishing it from an act under color of state law.

The court must grant a motion for summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party's burden is met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The Motion for Summary Judgment should be granted because the plaintiff cannot prove Mr. Townsend was acting in connection to his official capacity as a police officer in any material way at the time the incident occurred. The statute under which the plaintiff brings his action provides that

> "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State. . .subjects, or causes to be subjected, any citizen of the United States. . .to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

42 U.S.C.A. § 1983 (West 2019). Here, the element of a constitutional deprivation of rights is not at issue. Rather, this Brief will address the plaintiff's failure to fulfill the statute's requirement that the defendant act within the color of law.

Mr. Townsend's actions were not conducted under color of law, and thus summary judgment is appropriate. For an action to exist under color of law, the actor must exercise "power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Mr. Townsend's actions fail to warrant relief under 42 U.S.C.A. § 1983 for action under color of law for two reasons. First, his actions during the incident in question were of a purely private nature; second, his actions were carried out without regard to or aid of his authority under state law.

Mr. Townsend's actions during the incident were of a purely private nature because he wore civilian attire, he was participating with a family member in a private outing, he verbally acknowledged that he was off-duty, and he did not invoke his arrest power or verbally assert any police authority. "Purely private acts" carried out by an officer which do not promote "any actual or purported state authority are not acts under color of state law." *Barna v. City of Perth Amboy*, 42 F.3d 809, 816 (3d Cir. 1994). While a defendant who mentions to others outright that he is employed as an officer may act under color of law, *Lyons v. City of Phila.*, Civ. Action No. 065195, 2007 WL 3018945, at *1, 7 (E.D. Pa. Oct. 12, 2007), mere knowledge by those present

that the defendant is an officer is not enough to suggest action under color of law. *Costa v Frye*, 588 A.2d 97, 98 (Pa. Commw. Ct. 1991).

An off-duty police officer engaged in a private altercation does not act under color of state law if the officer does not verbally acknowledge his police authority or threaten arrest — even if the officer draws a gun during the altercation. *Costa,* 588 A.2d at 99. In *Costa,* an off-duty officer entered an argument over a poker machine with the plaintiff at a club. *Id*. He did not announce that he was a police officer, although some bar patrons knew this to be true. *Id.* After having objects thrown at him, the officer drew a gun, which discharged during a subsequent struggle. *Id.* at 98. Although the officer intended to make an arrest, he did not announce his intention. *Id.* at 99. The court held that the officer did not act under color of state law. *Id.* Characterizing the incident as "purely private," the court reasoned that the officer's response to the situation, even if it included drawing his gun, did not cause the incident to become a police matter because the officer was off-duty and asserted no police authority. *Id.*

Additionally, an off-duty officer's conduct is "personal" when the officer exchanges remarks of a merely personal nature with the plaintiff. *Pryer v. City of Phila.*, No. Civ.A.99-4678, 2004 WL 603377, at *4 (E.D. Pa. Feb. 19, 2004). In *Pryer*, the defendant was an officer who was dating the plaintiff's former girlfriend and became embroiled in an argument with him. *Id.* at 1. The fight between the plaintiff and defendant was precipitated by this dating relationship. *Id.* The plaintiff, although in possession of his badge, was off-duty and wore civilian clothing. *Id.* Although the *Pryer* court declined to grant summary judgment, it nonetheless noted the "evident" personal nature of the exchange, and further stated that the plaintiff's case could be "severely undermined by the personal nature of the confrontation." *Id.* at 4, 7.

Mr. Townsend's actions, which were similarly private in nature, do not reflect any authority under state law. Like the officer in *Costa,* Mr. Townsend responded to a physically unruly patron in a public context with the use of police paraphernalia. (R. at 11.) Also like the officer in *Costa*, Mr. Townsend did not threaten arrest, and at no time did he verbally invoke his status as an officer during his encounter with the plaintiff. (R. at 12.) Others around him realized he was an officer, as did the patrons in *Costa*, and like the officer in *Costa,* Mr. Townsend was off-duty. (R. at 4.) The private nature of Townsend's activity is compounded by the presence of his young son and his conscious decision to change his clothes, (like the defendant in *Pryer*) between watching the game and participating in the halftime event. (R. at 8.)

Although Mr. Townsend was concededly on-duty during his involvement in the stadium ceremony, he intentionally separated this segment of his visit, via his wardrobe change, from that in which he was merely a spectator and fan. (R. at 10.) Additionally, his remarks shared with the plaintiff, like those in *Pryer,* were personal. (R. at 9.) Rather than the admonitions of a police officer, Mr. Townsend shared only the concerns of a father and the frustrations of a fan. These circumstances, viewed as a whole, suggest a "purely private" situation in Mr. Townsend's case, wherein the presence of police indicia and knowledge that Mr. Townsend was an officer are not enough to paint Mr. Townsend's actions with the color of law.

Additionally, Mr. Townsend's conduct toward the plaintiff was not a cause of, or facilitated by, his authority under state law because the handcuffs were used in a manner unrelated to police duty and, except for handcuffs, he did not use or make visible any police equipment during the incident. To determine if officers have acted in their official capacity or invoked police authority, the Third Circuit analyzes "*all* of the acts of the officer, and no one act in particular, in context . . . ." *Pryer,* 2004 WL 603377, at *4. This analysis includes a

determination of whether the officer's actions were "consistent with actions taken by a police officer." *Id.* Further, a failure to invoke police authority at the start of an altercation forecloses the possibility of action under color of law. *Id.* While an off-duty police officer who "purport[s] to exercise official authority" generally acts under color law, these actions generally include "[m]anifestations of…pretended authority" such as showing one's badge, identifying oneself as an officer, arresting a person, or becoming involved in a dispute between others. *Barna*, 42 F.3d at 816. Finally, although an officer may use an object that suggests "objective indicia of police authority," a lack of actual authority to use the object at the time of the incident suggests the use falls outside of the color of law. *Id.* at 818.

An off-duty officer does not act under color of state law even when the officer beats a civilian and uses a police-issue nightstick in an unauthorized fashion, as long as the dispute is personal in nature. *Barna,* 42 F.3d at 818. In *Barna*, two off-duty officers were armed with police-issue guns and nightsticks but were not in uniform. *Id.* at 813. They became involved in an altercation with the plaintiff, during which one officer placed the plaintiff in a chokehold with the nightstick. *Id.* Both officers then physically beat up the plaintiff. *Id.* The court held that the officers did not act under color of state law. *Id.* at 819. The court reasoned that while an officer's use of his weapons furthers a 1983 violation at face value, this fact alone is not enough to conclude that an officer has acted under color of state law. *Id*. at 817. The court also reasoned that the personal nature of the dispute, coupled with the fact that the officers were off-duty, indicated a lack of "actual" or "purported" police authority. *Id.* The court further noted that accepting the government's asserted policy rationale, that "police officers are police twenty-four hours a day," would create liability for "any unauthorized use of a police-issue weapon, without

regard to whether there are any additional circumstances to indicate…actual or purported police authority." *Id.* at 818-19.

The holding in *Barna*, which is binding on this court, provides far wider latitude for off-duty police conduct than is necessary to exonerate Mr. Townsend's conduct at the football game as falling outside the color of state law. Like the officers in *Barna*, Mr. Townsend used a police tool while off-duty in response to an altercation of a personal nature. (R. at 11.) However, as the court in *Barna* found a nightstick chokehold to be insufficient to rise to the level of official authority, so too would a trip by handcuffs. In this case, Mr. Townsend could indeed have used any other device to cause the same effect on the plaintiff. Per the rule articulated in *Classic*, Mr. Townsend's acts would have been realizable for anyone who could find themselves in possession of a pair of handcuffs. When Mr. Townsend did use the handcuffs, he did not do so in the manner customary of police officers (namely, to restrain); instead, he tripped the plaintiff, which could have been achieved in various ways. (R. at 11.) He also allowed his son to use the handcuffs, an action similarly unlike that of an officer supposedly clothed in state authority. (R. at 10.)

The handcuffs used here do not imprint Mr. Townsend's actions with the stamp of state action; at best, their presence plays an incidental role. Further, to view Mr. Townsend's use of the handcuffs as a symbol of police power runs counter to the policy concerns articulated by the court in *Barna*. In addition, *Barna*'s holding that an extended attack on the plaintiff did not fall under color of law indicates that Mr. Townsend's brief striking of the plaintiff with a foam hand fails equally, if not more, as a matter of exerting state authority. (R. at 10.) Finally, Mr. Townsend's conscious decision to leave his gun behind, despite its carry being permitted by

department rules, suggests a distinction between his official role and his intended personal role during the incident. (R. at 16.)

Prayer for Relief

For the reasons stated above, Mr. Townsend respectfully requests that the Court grant the Motion for Summary Judgment on the issue of action under state law.

Respectfully Submitted,

/s_____
[NAME]
February 26, 2019 PA
I.D. No. 12345 1421
Liberty Blvd.
Altoona, PA 16601
(814) 526-2362
Attorney for Defendant, Clayton Townsend

Applicant Details

First Name	**Claire**
Middle Initial	**I**
Last Name	**Taigman**
Citizenship Status	**U. S. Citizen**
Email Address	**ctaigman@umich.edu**
Address	**Address** Street **921 South Main Street, #36** City **Ann Arbor** State/Territory **Michigan** Zip **48104** Country **United States**
Contact Phone Number	**2488218283**

Applicant Education

BA/BS From	**University of Michigan-Ann Arbor**
Date of BA/BS	**May 2017**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 7, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Journal of Gender & Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hannon, Margaret
mchannon@umich.edu
7347634714
Salim, Oday
osalim@umich.edu
7347637087
Gerads, Carly
carly.gerads@wicourts.gov
6122475121

References

Professor Oday Salim: osalim@umich.edu, 734-763-7087; Professor Margaret Hannon: mchannon@umich.edu, 734-763-4714; Ms. Jolie McLaughlin, jdmclaughlin@nrdc.org, 312-961-1287; Ms. Carly Gerads: carly.gerads@wicourts.gov, 606-247-5121

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Claire Taigman
921 South Main Street, #36
Ann Arbor, MI 48104
248-821-8283
ctaigman@umich.edu

August 26, 2020

The Honorable Elizabeth W. Hanes
U.S. District Court for the Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr. U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a rising third-year student at the University of Michigan Law School and I am writing to apply for a clerkship in your chambers for the 2021-2023 term.

Prior to law school I worked for a nonprofit organization running environmental and consumer protection campaigns, which led to my career goal of becoming a public interest litigator. Since returning to school I have focused on my legal research and writing, serving as an Executive Editor on the Michigan Journal of Gender & Law, working as a research assistant for a professor, helping draft a brief for a case in the Sixth Circuit through my work in the Environmental Law and Sustainability Clinic, and conducting research to shape the NRDC's legal strategy through my internship this summer. Yet, my favorite part of law school so far has been working for a judge. Through my internship with Justice Rebecca Dallet on the Wisconsin Supreme Court, I enjoyed spending my summer wading through complex state law issues and writing bench memoranda. My writing skills and excitement about diving into thorny legal issues are assets that would allow me to contribute to your chambers.

I have attached my resume, law school grade sheet, and a writing sample for your review. Letters of recommendation from two Michigan Law professors and a clerk for Justice Dallet are also attached:

- Professor Oday Salim: osalim@umich.edu, 734-763-7087
- Professor Margaret Hannon: mchannon@umich.edu, 734-763-4714
- Ms. Carly Gerads: carly.gerads@wicourts.gov, 606-247-5121

Thank you for your time and consideration.

Respectfully,

Claire Taigman

CLAIRE TAIGMAN

921 South Main Street, #36, Ann Arbor, MI 48104
248-821-8283 | ctaigman@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor GPA: 3.581/4.000 — Expected May 2021
Journal: Executive Editor, Michigan Journal of Gender & Law
Honors: Dean's Scholarship
Activities: Volunteer, Environmental Crimes Project; Project Access; Prosecutorial Misconduct Project Member, Women Law Students Association; Outlaws

UNIVERSITY OF MICHIGAN, GERALD R. FORD SCHOOL OF PUBLIC POLICY — Ann Arbor, MI
Bachelor of Arts in Public Policy; Minor in Law, Justice, and Social Change — April 2017
Honors: Phi Beta Kappa, Martin Luther King, Jr. Spirit Award, William J. Branstrom Freshman Prize

EXPERIENCE

NATURAL RESOURCES DEFENSE COUNCIL — Chicago, IL
Legal Intern — Summer 2020

- Researched and drafted memoranda about the Clean Water Act, federal administrative law, and state nuisance law to shape the NRDC's strategy in two federal lawsuits and a local policy initiative.
- Drafted guidelines for wind and solar energy siting in six midwestern states.

PROFESSOR DANIELLE KALIL, UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Research Assistant — September 2019-August 2020

- Researched immigration law, wrote summary memoranda, and edited footnotes for forthcoming article.

HON. REBECCA DALLET, WISCONSIN SUPREME COURT — Madison, WI
Judicial Intern — Summer 2019

- Conducted research and document review regarding tort, eminent domain, and criminal appeals.
- Analyzed factual and legal issues and recommended legal mandates in bench memoranda.
- Observed trials and other courtroom proceedings in the Dane County Circuit Court.

FUND FOR THE PUBLIC INTEREST — Madison, WI
Foundations Director — July 2017 – February 2018

- Recruited, trained, and managed a staff of 10 canvassers to raise $230,000, collect 9,000 petition signatures, and contact 30,000 community members about campaigns for Wisconsin Environment and Wisconsin Public Interest Research Group with focuses on environmental advocacy and consumer protection.
- Facilitated daily administrative procedures, including payroll and benefits packages for office staff, processing and depositing donations, budget oversight, and completing inventory of campaign materials.
- Personally fundraised $22,000 and collected 940 petition signatures regarding environmental campaigns.

SEXUAL ASSAULT PREVENTION AND AWARENESS CENTER — Ann Arbor, MI
Peer Led Support Group Facilitator — December 2015 – May 2017

- Facilitated meetings twice a week for student survivors of sexual violence at the University of Michigan, providing a safe and confidential environment for the discussion of trauma and self-care activities.

WASHTENAW COUNTY OFFICE OF THE PUBLIC DEFENDER — Ann Arbor, MI
Student Investigator — Summer 2016

- Interviewed indigent clients, analyzed evidence, reviewed presentence investigation reports with clients, and organized files and case calendars to prepare for criminal pretrial proceedings and show cause hearings.

INTERESTS: Art history, horror movies, live music, guitar, baking.

Claire Taigman
The University of Michigan Law School
Cumulative GPA: 3.581

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Maureen Carroll	B+	4	
Contracts	Nicolas Cornell	A-	4	
Legal Practice Skills I	Margaret Hannon	S	2	Legal practice is mandatory Pass/Fail. S is a passing grade.
Legal Practice: Writing & Analysis	Margaret Hannon	S	1	Legal practice is mandatory Pass/Fail. S is a passing grade.
Criminal Law	James Prescott	A-	4	

Winter 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Environmental Law and Policy	David Uhlmann	B	3	
Torts	Margo Schlanger	A-	4	
Legal Practice Skills II	Margaret Hannon	S	2	Legal practice is mandatory Pass/Fail. S is a passing grade.
Introduction to Constitutional Law	Daniel Halberstam	B+	4	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Environmental Law & Sustainability Clinic Seminar	Oday Salim	A-	3	
Federal Indian Law	Matthew Fletcher	A	3	
Administrative Law	Daniel Deacon	A-	4	
Environmental Law & Sustainability Clinic	Oday Salim	A-	4	

Winter 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Trial Advocacy/Family Law	Timmothy Connors and Margaret Connors	PS	3	
Employment Discrimination	Ellen Katz and Sarah Prescott	PS	4	
Evidence	Richard Friedman	PS	4	
Climate Change and the Law	David Uhlmann	PS	3	

Because of COVID-19, the University of Michigan Law School made all winter 2020 courses mandatory pass/fail. PS indicates a passing grade.

Fall 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Federal Courts	Daniel Deacon		4	
National Security & Civil Liberties	Barbara McQuade		3	
Global Constitutionalism	Daniel Halberstam		2	
Voting Rights/Election Law	Ellen Katz		4	

UNIVERSITY OF MICHIGAN LAW
Legal Practice Program
625 South State Street
Ann Arbor, Michigan 48109-1215

Margaret Hannon
Clinical Professor of Law

August 26, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am very pleased to write to you with my recommendation supporting Claire Taigman's application for a clerkship with your chambers. Claire was a student in my 2018-2019 Legal Practice class, Michigan Law's rigorous legal research and writing course. As a result, I have had the pleasure of getting to know Claire well and of spending a significant amount of time evaluating her work. Claire's writing and analytical ability, commitment to excellence, and impeccable character made her an excellent student and would also make her an ideal clerk.

Claire was a bright, focused, and committed student with strong writing and analytical skills. Claire started the year as a skilled writer, and she submitted consistently strong work throughout the year. Claire's final brief was very good, and displayed sophisticated, well-organized, and persuasive arguments. Claire impressed me with her ability to use both constructive criticism and her own judgment to improve her work, and this was particularly apparent in her final brief in comparison to her draft. She demonstrated similarly excellent research abilities: not only did Claire produce quality results, but she also had a great feel for how to research efficiently and explain the results of her research process. The class is graded on a pass/fail basis, and Claire's work easily exceeded the "pass" threshold.

Claire's abilities and commitment to excellence are also apparent in her work outside of my class. Most impressive is Claire's selection by her colleagues as an Executive Editor for the Journal of Gender and Law, which is evidence of her ability to work collaboratively, meticulous attention to detail, steadfast work ethic, and facility with legal scholarship.

Finally, Claire's character is impeccable. Claire worked diligently on each assignment for my class, and consistently submitted work on time. She took advantage of numerous opportunities to meet with me outside of class, demonstrating not only a commitment to excellence but also a genuine desire to learn and to enhance her skills. Claire is among a small group of students to make an affirmative effort to keep in touch after completing my class, and I enjoyed getting to know her outside of class and discussing law practice with her. Claire is personable, funny, and warm, possessing none of the arrogance that I often see of law students and lawyers. In sum, Claire is a lovely person who was a pleasure to teach.

Overall, I believe that Claire would be a wonderful addition to your chambers. Please do not hesitate to contact me if you would like to discuss Claire's qualifications.

Sincerely,

/Margaret Hannon/

Margaret Hannon
Clinical Professor of Law

August 25, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

For the clerkship position, I highly recommend Claire Taigman to you. During the Fall 2020 semester, I directly supervised Claire when she was a student in the Environmental Law & Sustainability Clinic. Her research and writing skills, ability to work under time pressure, and degree of organization would greatly benefit your chambers.

Claire worked on cases that required complex analysis in the areas of environmental and administrative law. One of her cases involved defending a district court victory on appeal. She quickly got up to speed on the pertinent facts and district court filings. Her contribution to the appellate brief involved statutory interpretation in the administrative context. Her research was exhaustive; her internal memos were concise yet thorough; and her analysis made it into the brief with only light editing.

For Claire's other case, she worked with a teammate to evaluate a client's legal options to manage legacy pollution. For that case, she had to evaluate contracts, regulations, guidance documents, and a significant amount of relatively new case law. I enjoyed my many conversations with her about the case. She successfully converted her internal memos to a reader-friendly opinion letter for which the client expressed much gratitude.

Aside from being a good researcher, writer, and analyst, Claire has excellent work ethic and a professional demeanor. She was punctual, dependable, and always prepared for meetings. She sought feedback and responded well to it.

It was a genuine pleasure to work with Claire. I recommend her wholeheartedly. If there is anything further I can tell you about Claire, please contact me anytime at osalim@umich.edu or 586-255-8857.

Sincerely yours,

Oday Salim
Director, Environmental Law & Sustainability Clinic

Letter of recommendation

STATE OF WISCONSIN
SUPREME COURT

To Whom It May Concern:

It is with great pleasure that I am recommending Claire Taigman for a judicial clerkship. My name is Carly Gerads and I am a law clerk at the Wisconsin Supreme Court. I supervised Claire during the Summer of 2019 when she was an intern in Justice Dallet's chambers. I believe her researching and writing skills make her an excellent candidate for a clerkship.

My summer supervising Claire assured me that she has the strong researching and writing skills that judicial clerks must possess. In Justice Dallet's chambers, we task our interns with preparing bench memos for cases that are set for oral argument. These memos are quite lengthy and require the interns to first explain the case's factual background and procedural posture. Then, the intern has to identify the issues presented by the parties, explain the relevant case law and statutes, and provide a comprehensive analysis of the parties' arguments. During Claire's time interning in Justice Dallet's chambers, she wrote bench memos on a variety of topics, including claim preclusion, ineffective assistance of counsel, and recreational immunity. She wrote in-depth bench memos and meticulously covered all the issues briefed by the parties, in addition to raising concerns and arguments of her own.

I would also note that Claire is a wonderful person and a joy to work with. She is extremely professional and was always on time. Additionally, Claire completed her work before the deadline and kept me abreast on the status of her projects.

Throughout the summer Claire and I sat down several times and discussed the cases that she had been assigned. She always posed interesting questions and I could tell she was eager to learn and motivated to put forth the best work product. In addition to talking about cases, Claire and I talked about her interest in being a future judicial clerk and what my day-to-day looked like at the Wisconsin Supreme Court.

For these reasons, I highly recommend Claire for a judicial clerkship position and would be happy to discuss my recommendation over the phone.

Sincerely,

Carly Gerads

Law Clerk to the Honorable Justice Rebecca Dallet

612-247-5121

CLAIRE TAIGMAN
921 South Main Street, #36, Ann Arbor, MI 48104
248-821-8283 | ctaigman@umich.edu

WRITING SAMPLE

I prepared this bench memorandum during my judicial internship with Justice Rebecca Dallet on the Wisconsin Supreme Court. Justice Dallet gave her permission to me to use this as a writing sample. This version is self-edited.

Memorandum

STATE OF WISCONSIN
SUPREME COURT

DATE: July 22, 2019

TO: Justice Rebecca Dallet; Law Clerk Carly Gerads

FROM: Claire Taigman

SUBJECT: State of Wisconsin v. Robert James Pope, Jr., 2017-AP-1720
Oral argument: September 7, 2019 at 9:45 am (first case)

RECOMMENDED MANDATE: Reverse the Court of Appeals.

PROCEDURAL POSTURE/STATEMENT OF FACTS

On May 31, 1996, a jury convicted petitioner Robert James Pope ("Pope") of two counts of first-degree intentional homicide as a party to the crime. The complaint alleged that Pope and four others plotted to kill Joshua Viehland for supposedly threatening another woman that they knew. One of the other defendants lured Viehland and his friend, Anthony Gustafson, into a house where they were both shot multiple times, resulting in their deaths at the scene. The State's theory was that Pope fired the first shot into Viehland's chest, the gun jammed, and then two of the other defendants began shooting. Pope disposed of his gun and was at large for four months after the homicides. Pope and one other defendant proceeded to trial. The State Public Defender's Office ("SPD") appointed attorney Michael Backes ("Backes") to represent Pope.

On July 2, 1996, the circuit court entered judgment on the verdict and sentenced Pope to two life sentences without the possibility of parole. That same day, Backes filed a "Notice of Right to Seek Postconviction Relief" form on behalf of Pope. On the form, which Backes and Pope signed, the box was checked indicating that Pope intended to seek postconviction relief and that notice would be timely filed by trial counsel within twenty days of sentencing. However, Backes never filed the notice of intent to pursue postconviction relief.

In July 1996, Pope wrote letters to Backes inquiring about the status of his appeals. Backes did not respond.[1] Pope got in

[1] Backes was later publicly reprimanded in two separate disciplinary proceedings involving four different clients. Most of these charges involved Backes accepting a retainer fee then losing touch with his clients, causing delays in postconviction proceedings. See In re Disciplinary Proceedings Against Backes,

touch with SPD, who reminded him that notice had to be filed within twenty days of sentencing, and that appellate counsel would be appointed after that. The SPD did not take it upon itself to file that motion, despite the statutory obligation of trial counsel to continue representing a person seeking postconviction relief in a criminal case. See Wis. Stat. § 809.30(2)(a)(2017-18).[2] The twenty days expired and no notice was filed.

On September 16, 1997, over a year after the expiration of the timeframe during which Backes was supposed to file notice of intent to pursue postconviction relief, Pope filed a pro se motion to reinstate his direct appeal rights with the court of appeals. On September 25, 1997, the court of appeals denied that motion, holding that even if trial counsel failed as alleged, Pope should have commenced proceedings on his own.

On October 15, 1997, Pope filed a pro se postconviction motion pursuant to Wis. Stat. § 974.06[3] seeking to reinstate his direct appeal rights. Pope alleged that the circuit court failed to adequately explain his postconviction rights, and that Backes rendered ineffective assistance. Pope requested that the circuit court order an evidentiary hearing for his ineffective assistance of counsel claims, or, alternatively, that the court reinstate his right to appeal his conviction. On October 20, 1997, the circuit court denied this motion, holding that the court of appeals denying Pope reinstatement of his direct appeal rights earlier was law that the circuit court did not have the authority to overturn.

Pope appealed this decision. While the appeal was pending, he filed a statement on the transcript that the court of appeals construed as a motion to waive all transcript fees. On December 15, 1997, the court denied Pope the transcript fee waiver. On December 23, the court of appeals issued an order notifying Pope that he had to file a timely statement on the transcript pursuant to Wis. Stat. §809.11(4)(b)[4] and directed him to do so within five days. Pope filed this statement on January 2, 1998, declaring that the sentencing transcript was the only one

2005 WI 59, 281 Wis. 2d 1, 697 N.W.2d 49; In re Disciplinary Proceedings Against Backes, 2005 WI 141, 286 Wis. 2d 65, 705 N.W.2d 267.

[2] All subsequent references to the Wisconsin Statutes are to the 2017-18 version unless otherwise indicated.

[3] Section 974.06 sets forth the procedure for appealing a criminal sentence.

[4] Section 809.11 (4)(b) sets forth the procedural requirement for appeals that statements of transcript be filed with the court of appeals, circuit court, and opposing parties.

necessary to prosecute his appeal of the § 974.06 motion. Several weeks later, Pope filed another statement on the transcript, saying that all the transcripts necessary for the § 974.06 appeal were already on file.

The circuit court's rejection of Pope's § 974.06 postconviction motion was affirmed by the court of appeals on March 5, 1999. The basis for this order was Pope not providing any explanation, exceptional circumstances, or good cause for waiting over a year to take pro se action on his appeal. Pope filed a petition for review, which this court denied.

In June 2003, Pope filed another pro se motion to the court of appeals requesting extension of time to file notice of intent to pursue postconviction relief. Pope alleged that his right to appeal with assistance of counsel was not intelligently and competently waived. He also explained the delay, arguing that inmates should not be expected to act as watchdogs over attorneys appointed to protect their constitutional rights. On July 11, 2003, the motion was denied based on the prior litigation. For over a decade, Pope took no further action.

On June 17, 2014, this court issued its decision in State ex rel Kyles v. Pollard, 2014 WI 38, 354 Wis. 2d 626, 847 N.W.2d 805 (summarized below). That same month, Pope filed a pro se petition pursuant to State v. Knight, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), in the court of appeals, alleging Backes' failure to file a notice of intent on his behalf.

On March 5, 2015, the court of appeals noted that the counsel's failure to file notice of appeal constituted deprivation of counsel, and where a defendant is deprived of counsel, the defendant is relieved from the burden of showing prejudice. Pope's case was remanded to the circuit court for an evidentiary hearing and findings of fact. The circuit court appointed new counsel for Pope. Backes testified at the hearing, which resulted in findings that Backes failed to file the notice of intent, despite indication on the form that Pope wished to appeal his conviction; that Pope unsuccessfully attempted to contact Backes regarding his appeal; and that Pope had been acting pro se to attempt to reinstate his appellate rights since 1996.

In September 2016, judgment was entered for a stipulation reinstating Pope's direct appeal rights and dismissing his habeas petition as moot. Notice of intent to pursue postconviction relief was then timely filed. It was at that point that Pope's counsel discovered that trial transcripts were never made, and the reporter's notes had been destroyed after ten years pursuant to SCR 72.01(47).

In March 2017, Pope filed a postconviction motion for a new trial pursuant to Wis. Stat. (Rule) § 809.30, claiming that the

unavailability of any trial transcripts denied him the right to an appeal. The circuit court held that because Pope is entitled to an appeal, regardless of the delay, and because the transcript was lost due to no fault of Pope, the proper remedy is a new trial. The court of appeals reversed based on Pope's failure to assert a facially valid claim of error. The court of appeals also held that Pope waived access to the transcripts based on his statements on the transcript in his attempted appeal of his § 974.06 motion in 1997.

ISSUES

Issue 1: When a criminal defendant's direct appeal rights are reinstated and transcripts are unavailable due to ineffective assistance of counsel, does requiring the defendant to assert a colorable claim of error deny the defendant meaningful appellate review?
Circuit court: Yes.
Court of appeals: No.
Recommended answer: Yes, given the right of a criminal defendant under Wisconsin law to a full or functionally equivalent transcript for his appeal.

Issue 2: Does a statement on transcript filed under Wis. Stat § 809.11(4)(b) in an appeal of a disposition on reinstated direct appeal rights thereafter bind a party for all subsequent appeals in the original criminal case?
Circuit court: Not discussed.
Court of appeals: Yes.
Recommended answer: No, because that appeal did not address the merits of Pope's case.

Issue 3: Is the stipulation that reinstated Pope's direct appeal rights void as a matter of law, given that both parties were unaware that a trial transcript was never created?
Circuit court: Not discussed.
Court of appeals: Not discussed.
Recommended answer: No. This court therefore should not remand this case so that the State can assert the laches defense.

STANDARD OF REVIEW

This court independently reviews the legal issues arising from habeas corpus petitions. State ex rel. Lopez-Quintero v. Dittman, 2019 WI 58, ¶11, 387 Wis. 2d 50, 928 N.W.2d 480.

Further, the central issues on review here are the sufficiency of the transcript for appeal and the circuit court's decision to grant a new trial. Whether a transcript is